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The Vietnam Draft Cases and the Pro-Religion Equality Project

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THE VIETNAM DRAFT CASES AND THE PRO-RELIGION EQUALITY PROJECT

Bruce Ledewitz*

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I. INTRODUCTION

On Saturday, April 27, 2013, The Center for Inquiry Institute held a symposium in Washington, D.C. on the topic, *Why Tolerate Religion?*¹ The topic was a reference to Brian Leiter's 2013 book by the same title.² This symposium was something of a coming out party culturally for a debate that had been ongoing in the legal academy for some time—the debate often denominated, *is religion special?*³ The Center for Inquiry Institute is an important institution in the growing secular cohort of American society. The holding of this symposium meant that the challenge to the uniqueness of religion

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1. Center for Inquiry Symposium: Why Tolerate Religion? (Apr. 27, 2013) [hereinafter CFI Symposium] (symposium program may be viewed at <http://action.centerforinquiry.net/site/Calendar?id=103301&view=Detail>).
2. BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013).
3. See Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 319 (2001).

in America would move from academic discussion to political and social struggle.

On one level, the question raised at the symposium was one of fairness. Why should religious believers receive exemption from generally applicable laws that impinge on religious practice and belief when nonbelievers would not receive the same protection in similar circumstances? This is how the fairness issue was framed in information about the symposium:

Should a corporation operated by religious believers be exempt from a federal rule mandating contraceptive coverage for employees, while an organization run by nonreligious persons is not? Should an employee who objects to performing certain tasks on the basis of their religion be accommodated, while objections by a nonreligious employee are ignored? Should a religious organization receiving government funding be allowed to hire only adherents of their particular worldview, while a secularist organization cannot do the same?⁴

It might be imagined that the point of this fairness issue is to expand exemptions for conscience so that persons not affiliated with organized religion would be protected. As the cases litigating possible religious exemption from the contraception mandate in the Affordable Care Act go forward,⁵ such an expansion of exemptions from religion specifically to conscience generally could change the current political landscape. It might help create new political coalitions between religious believers and nonbelievers.

But this impression that the issue is that of expanding exemptions would be mistaken. As the information about the symposium went on to make clear, the end result, and perhaps the goal, of raising the fairness issue is actually to restrict all conscience exemptions, including religious ones, in American law.

Leiter contends that the reasons for tolerating religion are not specific to religion, and instead apply to *all* claims of conscience—and that governments are not required to grant exemptions

4. See CFI Symposium, *supra* note 1.

5. According to The Becket Fund for Religious Liberty, as of Summer 2013, there are over sixty-seven cases and over two hundred plaintiffs challenging the contraception mandate in one form or another. *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited Dec. 20, 2013).

of any kind, religious or otherwise, from laws that promote the general welfare.⁶

This restriction on exemptions from generally applicable laws, which would be viewed by many religious believers as an assault on religious liberty disguised as a protection for secular conscience, would come as no surprise to participants in the ongoing *is religion special?* debate.⁷ That debate has assumed on both sides that religion will continue to enjoy protection in public policy and in law *as religion* only if religion is regarded as special.⁸ The two sides in this debate have shared the starting point that religion is unique and can be distinguished from philosophical or other deep secular commitments. The two sides differ not as to whether religion is unique, but as to whether religion is *especially valuable* when compared to other forms of conscience.⁹

This paper aims to change the terms of this debate about religion. I agree with Leiter that religion understood in some formal and organizational sense is not special compared to other forms of conscientious commitment, that is, not especially valuable. But I disagree both with Leiter and most of the participants in this debate, on both sides, that religion is unique. Religion cannot be distinguished from certain forms of philosophical or other deep commitments practiced by persons who are not members of organized religion and who may not consider themselves to be religious. No attempt to distinguish conscientious believers and conscientious nonbelievers should be made.

The effect of this change from understanding religion as unique to seeing religious conscience and nonreligious conscience as one continuum would be to expand the reach of religious exemptions in law rather than to subsume religious exemptions into conscience exemption clauses. But this expansion would not have the effect of negating the effectiveness of such clauses. In other words, the expansion in exemptions that I propose would not be so vast as to require that there be no, or almost no, exemptions at all from generally applicable laws. The model for this expansion in interpreting religious exemptions is the Vietnam era draft cases, in

6. LEITER, *supra* note 2, at 101.

7. See Rutherford, *supra* note 3, at 319.

8. See *id.* at 323.

9. See Chad Flanders, *The Possibility of a Secular First Amendment*, 26 QUINNIPIAC L. REV. 257, 293 (2008).

which nonreligious conscience was treated by the Supreme Court as basically identical to religious conscience.¹⁰

Because the equal value of religious conscience and nonreligious conscience becomes, in Leiter's treatment, a reason for restricting the reach of exemptions from generally applicable laws, and because this restriction applies primarily to traditionally religious claims, I call his position the Anti-Religion Equality Project. And, for opposite reasons, I call my position the Pro-Religion Equality Project, since I propose retaining traditional protections for religious belief and practice and expanding them to beliefs that are not traditionally considered religious.

The article proceeds in Part I to set forth Leiter's position, in Part II, to place his argument within the context of the ongoing debate in American law and society over the special place of religion, and in Part III, to evaluate Leiter's project. In my view, Leiter fails to define religion convincingly, but, surprisingly, I also conclude that this failure is not central to his position. This conclusion leads me, in Part IV to propose the Pro-Religion Equality Project. Part V describes the Vietnam War draft cases, *United States v. Seeger*,¹¹ *Welsh v. United States*,¹² and *Gillette v. United States*¹³ as illustrative of the Pro-Religion Equality Project in practice. In Part VI, I explore the difficulties that arise from conscience clauses in the context of exemptions from mandatory vaccination laws and suggest that the expansion of religious exemptions in that context would be a much better policy. In Part VII, I set forth some objections to the expansion of religious exemptions as an alternative to conscience clauses. Part VIII explores the implications of the Pro-Religion Equality Project for healing some of our divisions over religion and nonbelief. Finally, my conclusion suggests that the easy assumption of secularity that nonbelievers make may mask the difficult task of creating a flourishing secular civilization, including a role for serious spiritual seeking in secularism.

As will become clear, this article does not really aim at solving the legal problem of the proper interpretation of religious exemption provisions. This article does not even discuss the difference between religious exemptions that are absolute, as in the draft cases, and the balancing tests in free exercise and religious liberty statutory exemption challenges, such as that of the Religious Freedom

10. See *infra* Part V.

11. 380 U.S. 163 (1965).

12. 398 U.S. 333 (1970).

13. 401 U.S. 437 (1971).

Restoration Act (RFRA).¹⁴ Rather, my concern is the growing divide in America between believers and nonbelievers. It is my hope that the recognition that those who practice traditional religions share similar beliefs with many of those who do not, will lead to reconciliation and a reduction in the enmity that currently characterizes American life.

II. WHY TOLERATE RELIGION?

The argument in Leiter's book is made in simple and straightforward fashion. The main point Leiter argues is that there is no "credible *principled* argument for tolerating religion *qua* religion . . ."¹⁵ In Chapter 1, Leiter sets forth the moral and epistemic cases for principled toleration, primarily by the state, of private choices and conscientious commitments in general in the absence of harm to others or a threat to social order.¹⁶ These arguments are, and are meant to be seen as, philosophically traditional.¹⁷ The moral arguments are said to be typically Kantian or utilitarian.¹⁸ The moral arguments "claim either that there is a *right* to the liberty to hold the beliefs and engage in the practices of which toleration is required; or that toleration of those beliefs and practices is essential to the realization of morally important goods."¹⁹ The epistemic arguments for toleration emphasize, instead, "the contribution that tolerance makes to *knowledge*."²⁰

The reader should note that principled toleration for Leiter does not demand very much of the state. The state may not suppress conscientious beliefs and may not select conscientious practices in particular for legal sanction, but that essentially exhausts the state's obligation.²¹ The limits on toleration, which Leiter refers to as *side-constraints*,²² and which he asserts impact mostly on conscientious practices rather than beliefs, include preventing damage to the public order and other forms of harm.²³

14. 42 U.S.C. § 2000bb to 2000bb-4 (2006).

15. LEITER, *supra* note 2, at 7.

16. *See id.* at 7–8, 10, 15.

17. *See id.* at 8, 10.

18. *See id.* at 15.

19. *Id.*

20. *Id.* at 19.

21. *See id.* at 63.

22. *Id.* at 21.

23. *See id.* at 22–23.

Leiter does not expressly define what he means by conscientious commitments, either in Chapter 1 or anywhere else in the book. He suggests at one point, however, a very broad understanding of conscience as “*being able to choose what to believe and how to live.*”²⁴ Later in the book, conscience will be described as something narrower, as something much more serious and imperative.²⁵

Since Leiter is going to argue that religious conscience as a category does not deserve any greater legal protection or social acknowledgment than secular conscience, he sees it as necessary, in Chapter 2, to define religion as a unique realm.²⁶ Referring to the work of John Witte, Leiter denies that religion is a unique source of individual and personal identity.²⁷ But he agrees with Witte that the concept of owing a duty to our Creator, while not literally present in every religion, does distinguish religion in terms of the “normativity of (at least some) religious commands”²⁸ Drawing on the work of Timothy Macklem, Leiter states that religious belief is based on faith rather than reason.²⁹

Leiter concludes from these sources that for all religions, there are at least some central beliefs:

1. issue in *categorical* demands on action—that is, demands that must be satisfied no matter what an individual’s antecedent desires and no matter what incentives or disincentives the world offers up; and
2. do not answer ultimately (or at the limit) to *evidence* and *reasons*, as these are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on “faith,” are insulated from ordinary standards of evidence and rational justification, the ones we employ use both common sense and science.³⁰

Leiter then proceeds in Chapter 2 to test out these two criteria in terms of possible under inclusiveness and over inclusiveness.³¹ In

24. *Id.* at 17–18.

25. *Id.* at 95; *see infra* notes 72–79 and accompanying text.

26. LEITER, *supra* note 2, at 4–7, 31–35.

27. *Id.* at 32–33.

28. *Id.* at 33.

29. *Id.* at 31.

30. *Id.* at 33–34.

31. *Id.* at 46.

terms of under inclusiveness, Leiter is asking whether any traditions generally regarded as religious are excluded by his definitions.³² Leiter concludes that both Buddhism and certain “intellectualist” strains of Christianity, though purporting to be based on reason, still fit his definition of religion.³³ In terms of over inclusiveness, Leiter concludes that Marxism and morality in general, though clearly issuing in categorical demands, are not insulated from evidence and reason in the same sense as is religion.³⁴ In the course of this discussion, Leiter discards a possible third criterion of religion—that it “involve, explicitly or implicitly, a *metaphysics of ultimate reality*.”³⁵ This quality, Leiter believes, is already captured by religion’s insulation from evidence.³⁶ In order to distinguish religion more sharply from morality, however, Leiter adds another distinction: that there are some beliefs in religion that “render intelligible and tolerable the basic existential facts about human life, such as suffering and death.”³⁷

Having now defined religion and religious belief, Leiter proceeds in Chapter 3 to ask whether religion, understood in this way, deserves special protection in law and special acknowledgment from society.³⁸ His answer is no because, in terms of moral reasons, there is no greater right to religious conscience than to any other form of conscience (we would not distinguish religious conscience from liberty of conscience in Rawls’s original position, for example), and because religious beliefs, since they are insulated from reason and evidence, are not any more likely to give us knowledge than conscientious beliefs of any other kind.³⁹ Of course, religious beliefs and practices deserve toleration, but that is because they involve matters of conscience, not because they involve matters of religion.⁴⁰

At this point in Chapter 3, Leiter explores a concrete case of claimed religious exemption from generally applicable law.⁴¹ The concrete instance is one of a male believer in the Sikh religion who must wear a ceremonial dagger or sword and who runs afoul of a law

32. See *id.* at 42.

33. *Id.* at 40, 45–46.

34. *Id.* at 38, 49–50.

35. *Id.* at 47.

36. *Id.*

37. *Id.* at 52.

38. *Id.* at 61.

39. *Id.* at 63.

40. *Id.* at 64.

41. *Id.*

banning weapons in public schools.⁴² Leiter begins his book with a contrast between this fourteen-year-old Sikh boy and a boy from a rural family whose family tradition entails the passing of a dagger or knife from father to son across the generations.⁴³ In the Introduction, the contrast of the two instances is meant to raise the question of religious exemptions from general law versus nonreligious exemptions from general law.⁴⁴

But in Chapter 3, Leiter raises the issue of the religious exemption for a different purpose. Here the point is that an exemption of any kind from a generally applicable law should not be granted if it causes harm to others.⁴⁵ Leiter criticizes the Canadian Supreme Court case that permitted the Sikh child to carry the ceremonial knife.⁴⁶ In Leiter's view, the school setting should not have been distinguished from the contexts of courtrooms and airplanes, where no accommodations for ceremonial weapons are permitted.⁴⁷

This discussion in Chapter 3 illustrates an ambiguity that afflicts the entire book. As explained above, principled toleration for Leiter is always limited by the harm principle.⁴⁸ This has nothing to do with exemptions, religious or otherwise, from generally applicable laws. If toleration is not demanded because a particular religious practice threatens harm, then not only should there be no exemption for such a practice, but the practice itself should be banned. For example, religious human sacrifice could be specifically banned, along with homicide in general, on the theory that if there is a religion widely practiced that encourages human sacrifice, countering that encouragement would justify banning human sacrifice *per se*.⁴⁹

It should follow then that if there is a law banning some particular act as dangerous in general, such as a ban on weapons in school, toleration would never require, or even permit, a religious or conscience exemption from that law. For such an exemption would by definition run afoul of the harm principle.

The ambiguity lies in the fact that Leiter never explains the level of generality at which the harm principle operates. Clearly, laws banning weapons in school are justified by the harm principle and

42. *Id.*

43. *Id.* at 1–2.

44. *See id.* at 3.

45. *See id.* at 62–63.

46. *Id.* at 64–65 (criticizing *Multani v. Comm'n scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.)).

47. *Id.* at 65.

48. *See id.* at 21–23, 62–69.

49. *See id.* at 66. This is my example rather than Leiter's, but it follows from his views.

serve the common good. But, just as clearly, practitioners of the Sikh religion who have ceremonial daggers pose no real threat at all to public order. So, aside from the concern about a child who only claims to be a sincere devotee of the Sikh religion, or aside from the highly unlikely event that a Sikh schoolchild becomes deranged, there is no way to decide whether the harm principle prohibits an exemption to the no weapons policy or not. But Leiter condemns the exemption without resolving how these judgments should be made, or even which party, the believer or the state, should have the burden of proof that no danger of harm is present in this one instance.⁵⁰

In Chapter 4, Leiter rejects the argument by Martha Nussbaum, who undoubtedly speaks for many in her book *Liberty of Conscience*,⁵¹ that religion is entitled to more than mere toleration—that religion is entitled to respect.⁵² Leiter argues that religion is entitled to minimal respect, but not to any affirmative concept of respect, and that minimal respect is not much different from religion's right to toleration.⁵³ Leiter concludes that since religion is insulated from ordinary standards of reason and evidence, religion is culpable false belief: that is, religious believers hold beliefs that are unwarranted and which they ought to know are unwarranted.⁵⁴ Efforts by apologists for religion, such as William Alston and Alvin Plantinga, to show that religion is rational are simply efforts to justify insulation of religious faith from ordinary standards of reason and evidence in common sense and the sciences.⁵⁵

Not only are religious beliefs likely to be false, but since they are also often issue in categorical demands, we can assume that they are especially likely to cause harm to others. Leiter admits that religious belief has often also led to impressive defenses of human rights when most others have been silent.⁵⁶ Nevertheless, the track record of religion is too mixed to rely on this occasional heroic phenomenon.

50. See *id.* at 110–15. Perhaps it will prove to be the case, for example, that any exemption will raise impossible proof issues or will be impossible to limit appropriately. But these problems must be shown, which is what I refer to as the burden of proof that Leiter ignores.

51. *Id.* at 68; MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008).

52. LEITER, *supra* note 2, at 68.

53. *Id.* at 69.

54. See *id.* at 77–81.

55. *Id.* at 81.

56. *E.g., id.* at 36.

Nor does Leiter agree with John Finnis that religion contains more truth about reality than can any atheism.⁵⁷ Finnis is referring to the Thomist concept of the norm of rationality—that there is a reason beyond chance or necessity why things are as they are—which, Finnis argues, guides all rational inquiry, including that of science.⁵⁸ Leiter denies that an “explanatory reason,” in the sense of such causation or telos, is essential to rational inquiry.⁵⁹ Thus, religion, like any realm of conscience, is entitled to toleration but not to respect.

In Chapter 5, entitled broadly *The Law of Religious Liberty in a Tolerant Society*, Leiter attempts to provide a big picture of the proper overall treatment of religious liberty in a liberal society.⁶⁰ But it quickly becomes apparent that Leiter will not actually develop any broad approach that would set forth standards for when exemptions for conscience, religious and secular, from neutral laws should be granted.

Instead, it turns out that Leiter’s concern is to bring a prior inconsistency into alignment.⁶¹ Leiter believes that he has shown that liberty of conscience should be protected “under the rubric of principled toleration.”⁶² He believes that he has also shown that there is no principled reason to grant religious conscience any greater legal protection than nonreligious conscience.⁶³ The problem Leiter focuses on is that, on the one hand, “*liberty of conscience* generally is morally important,” but under “extant law” religious liberty is treated as more important than liberty of conscience generally—in America in a de jure fashion and in every other Western democracy in a de facto fashion.⁶⁴ Leiter believes that his proposed adjustment in the balance of religious and nonreligious conscience will play out over the issue of exemptions from generally applicable laws.⁶⁵

Of course, by this formulation the reader has no way to know whether Leiter believes that religious liberty is now receiving the theoretically proper level of protection and other forms of conscience simply need to be protected to a greater extent, or whether Leiter

57. *Id.* at 86–87.

58. *Id.* at 87–88.

59. *See id.* at 88–89.

60. *See id.* at 92–133 (arguing that liberal societies should not grant religious exemptions).

61. *See id.* at 93, 132–33.

62. *Id.* at 92.

63. *Id.* at 92–93.

64. *Id.*

65. *Id.* at 93.

believes that the protection of religious liberty is too strong and needs to be reduced, or whether some combination of increase and reduction will be Leiter's goal.

Because he is not really designing a general regime of liberty, Leiter never specifies the attributes of conscience that might justify an exemption from a generally applicable law. The two examples of conscience claims that Leiter previously set forth—that of the Sikh boy under whose tradition a ceremonial knife must be carried into school and the rural boy whose familial traditions entail a similar demand⁶⁶—describe well-established practices. The reader might conclude, therefore, that conscience, to be recognized, must be objectively identifiable by some kind of communal custom. Leiter quickly excludes that possibility by including the example of the “lone eccentric, who for reasons known only to him, feels a categorical compulsion, with which he deeply identifies as a matter of personal integrity, to always have a knife nearby”⁶⁷ Conscience, for Leiter, is potentially an individual matter.⁶⁸ He notes that perhaps Thoreau was such a lone eccentric.⁶⁹

Leiter's hostility toward conscience exemptions only becomes apparent when he begins his discussion of liberty of conscience with an echo of Justice Scalia's position in *Employment Division v. Smith*⁷⁰—that to recognize a universal exemption for conscience would “appear to amount to a legalization of anarchy!”⁷¹ He first addresses the evidentiary problem in evaluating claims of conscience.⁷² Leiter asserts now, for the first time, that a valid claim of conscience must be “a kind of moral imperative central to one's integrity as a person, to the meaning of one's life.”⁷³ Therefore, a

66. *Id.* at 1–2.

67. *Id.* at 93.

68. *See id.* at 95.

69. *Id.* at 160 n.1.

70. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

71. LEITER, *supra* note 2, at 94. The exclamation point belongs to Leiter and he does not refer to Justice Scalia's opinion that “[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.” *Smith*, 494 U.S. at 888. Justice Scalia, in context, was criticizing a robust application of the compelling state interest test to claims of religious exemption, which is similar to the objection Leiter is raising.

72. LEITER, *supra* note 2, at 94.

73. *Id.* at 95.

legal system must have a way to distinguish claims of conscience from other sorts of objections to law, such as self-interest.⁷⁴ Leiter admits that limiting conscience exemptions to the category of religion grants an evidentiary advantage in this regard because a religious claimant must at least reference a religion.⁷⁵

One way to deal with this evidentiary problem might be to limit claims of conscience to communal traditions that mimic the practices of religious groups. The example that Leiter gives is the "vegan prisoner" who is a member of the "animal liberation movement."⁷⁶ Leiter concludes that the problem with this kind of compromise is that it treats different kinds of claims of conscience unequally in a context in which the unequal treatment is not justified except by pragmatic reasons of proof.⁷⁷

Leiter at this point introduces an objection to universal exemptions for conscience that he believes goes beyond evidentiary problems and even equality problems.⁷⁸ Exemptions from generally applicable laws often impose burdens on others, whether these others are ones who must take up the slack, as in the case of conscientious objection to military duty, or are ones who must deal with the consequences of the objection, as in the taxpayers and kitchen staff who must deal with food exemptions in prison.⁷⁹

Leiter states that, in a circumstance in which general compliance with laws is necessary to promote the "common good," any scheme of exemptions from those laws is "morally objectionable."⁸⁰ Leiter gives examples of laws that promote the general welfare and thus for him ground a moral objection to any exemptions: zoning regulations, mandatory vaccination laws and a weapons ban in schools.⁸¹ And he gives examples of exemptions that he says do not necessarily raise this moral objection: the right to wear religious clothing and to use certain illegal narcotics in religious rituals.⁸²

Despite Leiter's statements to the contrary, Leiter is not distinguishing here among different kinds of laws. All of these laws promote the common good. Rather, he is distinguishing among exemptions from law based on which exemptions impose burdens on

74. *Id.*

75. *Id.*

76. *Id.* at 96-97.

77. *See id.* at 98.

78. *Id.* at 98-99.

79. *Id.* at 99.

80. *Id.*

81. *Id.* at 99-100.

82. *Id.* at 100.

others. Placing a burden on others seems to be what he means by the moral objection to a universal scheme of exemptions from law. But it is not clear why and in what sense an exemption from a zoning regulation always imposes such a burden on others, while an exemption for drug use never does.

Leiter then suggests, as a potential rule, that there be no exemptions from generally applicable laws, "except when no burden-shifting is involved."⁸³ Again, Leiter has not explained why there should ever be exemptions from laws that serve the general welfare, even when there is no burden shifting involved. He states in a footnote that one reason to accept exemptions at all is a kind of moral realism about rights, which as a "moral skeptic" he does not share.⁸⁴ Leiter admits that he cannot be certain that the majority's vision of morality is more reliable than that of the individual conscience objector.⁸⁵ This seems to me to be a crucial problem for him, but at this point Leiter simply stops.⁸⁶ The discussion in the book just goes back and forth, without explanation, from a proposed regime of no exemptions unless there are no burdens to others to a regime of no exemptions at all.⁸⁷

Leiter acknowledges that a rule of no exemptions in practice will burden minority claims of conscience, religious or otherwise, since laws enacted by the majority will presumably not impinge on mainstream conscientious objection.⁸⁸ Leiter also admits that some religious practices, such as charitable activities, are entitled to more than mere toleration, and thus, may be granted exemptions from certain laws, such as is the case with tax exempt organizations.⁸⁹ But religious conscience in general is entitled only to toleration.

Leiter reminds the reader that while a rule of no exemptions from laws that promote the general welfare is justified under principled toleration, state hostility to religious practices per se violates

83. *Id.* at 101.

84. *Id.* at 163 n.12.

85. *See id.*

86. *See id.*

87. *See id.* at 103–04 (referencing a regime of "no exemptions for burden-shifting claims of conscience").

88. *Id.* at 101–02. The experience of the Affordable Care Act litigation gives pause here since the objectors to the contraception mandate include very mainstream Roman Catholic and other Christian objectors. Perhaps we are entering a time in which the logic of the culture wars will drive secular policymakers increasingly to challenge traditional religious positions. This may prove to be the case with the legalization of gay marriage, as another example.

89. *Id.* at 103.

principled toleration.⁹⁰ In Leiter's view, the French ban on religious clothing in public schools is an instance of intolerance rather than an instance of the rule of no exemptions.⁹¹ The difference between the two is not just that the French ban seems to be motivated by anti-Islamic bias.⁹² That kind of forbidden animus could, in principle, be proved and religious practitioners protected by the courts.⁹³ The reason that the French ban on headscarves is intolerant is that any claim of harm from such religious clothing is speculative and unlikely to be empirically vindicated.⁹⁴ After all, the harm claimed in defense of the ban is not the risk of physical assault or other forms of harassment, but only the promotion of the "moral ideal of equal citizenship."⁹⁵

It is not obvious why the threat to this moral ideal posed by religious garb in public schools is not a real harm that the French are entitled to prohibit under principled toleration. It is clear that Leiter wishes to distinguish laws that are in some way aimed against practices of conscience from laws with neutral objectives.⁹⁶ The former laws are generally unjustified. The latter laws are not only justified themselves, they are justified even if they do not provide exemptions for conscience. The difference between the two has to do with the kinds of goods that the state may legitimately promote.

Leiter takes strong exception to the Rawlsian view that the state may not endorse a substantive vision of the good.⁹⁷ Leiter considers such endorsement not only proper but inevitable by any state.⁹⁸ But there are no visions of the good that are acceptable to everyone. Undoubtedly, such state endorsement is in a sense a burden on the consciences of the dissenters, but the dissenters have no moral claim to exemption from laws expressing the state's vision of the good. The closest that Leiter comes to enunciating a general statement about the role of conscience, including religion, in terms of the goods pursued in a liberal state is that, consistent with principled toleration, the state may endorse a conception of the good that conflicts with the claims of conscience of some of its citizens as long as its objective is

90. *Id.* at 103–04.

91. *Id.* at 104–05.

92. *Id.* at 105–07.

93. *See id.* at 107.

94. *Id.* at 114.

95. *Id.* at 113.

96. *Id.* at 114.

97. *Id.* at 108.

98. *See id.* at 117.

not to suppress or coercively burden those claims of conscience, but to serve the state's conception of the good.⁹⁹

Leiter must walk a fine line here. In his view, principled toleration is equally compatible with an established church or with disestablishment.¹⁰⁰ Within the context of disestablishment, Leiter believes that religious concerns may properly be banished from some contexts in the public square, such as public schools.¹⁰¹ Leiter argues that the Supreme Court is mistaken in prohibiting public schools from barring use of public facilities by religious groups.¹⁰²

The seeming inconsistency here is that the state's conception of the good might even include a view of religion as mythology—a false claim versus the scientific claims of evolution and geology. At first glance, that would seem to be the situation in France. Where the French went too far, according to Leiter, was in banning religious expression where there was no realistic threat to the state conception of the good as secular.¹⁰³ No threat, that is, beyond the legitimate expression of a “different Vision of the Good.”¹⁰⁴ But, of course, this is conclusory. It could just as easily be asserted that the use of public facilities by religious groups poses no realistic threat of harm either.

Finally, Leiter mentions and dismisses the ground of religious exemptions from law premised on likely resistance by religious believers.¹⁰⁵ Leiter concedes that the majority's laws may be unjust. Religious believers, or other claimants of conscience, may be correct to resist unjust laws.¹⁰⁶ Such considerations are separate, however, from the moral justifications of exemptions from the general requirements of law.

I have described Leiter's position at length because I will rely later in this article on the reader's understanding of distinctions that I will draw with regard to Leiter's views. But Leiter's arguments did not arise in a vacuum. The context is necessary for a full evaluation of his position.

99. *Id.*

100. *Id.* at 117–18.

101. *Id.* at 120–21.

102. *Id.* at 123.

103. *Id.* at 121.

104. *Id.* at 119.

105. *Id.* at 131–32.

106. *Id.* at 132–33.

III. THE ANTI-RELIGION EQUALITY PROJECT IN CONTEXT

Leiter is arguing two separate propositions. First, he is arguing that religious conscience is equivalent to nonreligious conscience in terms of its value, both to the individual's conscience and to society in some more general sense.¹⁰⁷ Thus, religion is not special. The implication of this first position is that instances of nonreligious conscience deserve the same level of legal protection as instances of religious conscience. I call this aspect of Leiter's position, the Equality Project, because it places religious and nonreligious conscience in a position of equality. There is no way to tell *a priori* whether conscience receives a great deal of legal protection or very little.

Leiter's second proposition concerns the ultimate level of protection any form of conscience should receive. The level of protection that Leiter proposes is based on the principle of toleration, which, since it prohibits any form of discrimination or coercion aimed at conscience per se, would yield a high level of protection in the context of a government hostile toward religion.¹⁰⁸ This is the lesson of Leiter's condemnation of the French ban on headscarves in public schools.¹⁰⁹

But in the context of a liberal regime protective generally of, or at least not hostile to, liberty of conscience and religion, toleration promises very little, since it does not require exemption from any neutral law of general applicability. In practice, therefore, Leiter's scheme perfectly replicates the balance of *Employment Division v. Smith*¹¹⁰ and *Church of the Lukumi Babalu Aye v. City of Hialeah*,¹¹¹ which, respectively, hold that the Free Exercise Clause does not require a religious exemption from any neutral, generally applicable law, but that the clause does usually prohibit discrimination against religion.¹¹²

In the context of such a limited degree of legal protection for conscience in general, the net effect of Leiter's position, if it were adopted, would be to reduce the level of legal protection that exists today for religious conscience under either state constitutions, or

107. *Id.* at 133.

108. *See id.* at 105.

109. *See id.* at 104–06.

110. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

111. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

112. *See id.* at 529–30; *Smith*, 494 U.S. at 882–83.

federal and state religious exemption statutes.¹¹³ That is why I refer to the equality proposed by Leiter as one that is anti-religion. Thus, I call his position overall the Anti-Religion Equality Project.

The debate over Leiter's own Anti-Religion Equality Project has been going on for quite some time. Leiter originally set forth his position in a 2008 law review article.¹¹⁴ Apparently, however, the paper upon which that article was based had been circulating among legal academics much earlier than that.¹¹⁵

But if we think of the context not just in terms of Leiter's specific arguments, but in terms of the general acceptance and honor that used to be accorded to religion, the debate over the value of religion has been growing for quite some time in American legal circles.¹¹⁶ Prior to *Smith* in 1990, the subject of hostility to religion mostly came up in law review literature as the question about whether a particular ruling, or rulings, by the Supreme Court manifested a forbidden hostility toward religion in the context of interpretation of the Establishment Clause.¹¹⁷ Thus, in 1989, Mark Tushnet had difficulty taking seriously Kent Greenawalt's concern about "[a] good many professors and other intellectuals [who] display a hostility or skeptical indifference to religion that amounts to a thinly disguised contempt for belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience."¹¹⁸ Tushnet responded, "There may of course be adamant strict separationists

113. See Bruce Ledewitz, *Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions*, ELON L. REV. (forthcoming 2013) (manuscript at 53–54) (providing a general treatment of the national context for religious exemptions).

114. See generally Brian Leiter, *Why Tolerate Religion?*, 25 CONST. COMMENT. 1 (2008) (setting forth Leiter's fundamental position). The gist of chapter four was published later, in Brian Leiter, *Foundations of Religious Liberty: Toleration or Respect?*, 47 SAN DIEGO L. REV. 935, 937–38 (2010).

115. See Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2006 CATO SUP. CT. REV. 257, 279–80 (2006).

116. See, e.g., CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 76–77 (2007) (arguing for "equal liberty" for religious and nonreligious commitments).

117. See, e.g., Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 958 n.17 (1989) ("Although I am unaware of any reputable scholar or judge who has argued that the [E]stablishment [C]ause requires government to be actively hostile to religion, many scholars have argued that current establishment doctrine is in fact hostile to religion in its consequences, and perhaps in its inspiration.").

118. Mark Tushnet, *Religion in Politics*, 89 COLUM. L. REV. 1131, 1134 (1989) (reviewing KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988)).

who would invalidate all laws that rested in some significant way on religious motivations. To the extent that such people are intolerant of those who simply hold religious views, they need not be taken seriously.”¹¹⁹ Donald McConnell refers to this period as “a *defacto* settlement of the balance between religious liberty and secular liberal public policy.”¹²⁰ In other words, there was a general pro-religion consensus during this period.

Smith came as something of a shock to this context. The case was criticized as hostile to free exercise values.¹²¹ The immediate response to *Smith* was a debate over returning to a preexisting norm that was perceived as not having been hostile toward religion.¹²²

The situation today in the legal academy is very different. Paul Horwitz describes what has happened as the collapse of a fragile consensus.¹²³ The difference is certainly related, as Horwitz argues, to larger cultural forces such as the New Atheism and to a resurgence of the demands of religious believers to be heard in the public square.¹²⁴ I will return to that larger, cultural context in a moment.

But if I had to name a single event that crystalized latent ambivalence, if not hostility, toward religion in the legal academy, it would be the scandal of sexual abuse in the Catholic Church.¹²⁵ The most ardent expression of that hostility, revolutionary at the time in its candor, was Marci Hamilton’s 2005 book, *God vs. the Gavel*.¹²⁶ After the publication of Hamilton’s book, it became acceptable for American legal academics to express skepticism about the beneficent role of religion. Religion was no longer special, at least not for everyone.

Once the gloves were off, so to speak, the ground was prepared for Leiter’s question, *Why Tolerate Religion?* And, of course, there are

119. *Id.* at 1135.

120. Donald R. McConnell, *Is Modern Legal Liberalism Still Compatible with Free Exercise of Religion?*, 33 CAMPBELL L. REV. 641, 643 (2011).

121. See, e.g., Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 681–82, 687–91 (1992).

122. See, e.g., Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL’Y 181, 183–88 (1992).

123. PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* 3–4 (2011).

124. *Id.* at 22–30.

125. For a description of the scandal and the early response of the Church, see NICHOLAS P. CAFARDI, *BEFORE DALLAS: THE U.S. BISHOPS’ RESPONSE TO CLERGY SEXUAL ABUSE OF CHILDREN* (2008).

126. MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 3, 5–6 (2005).

religious¹²⁷ and nonreligious¹²⁸ defenses of the uniqueness of religious liberty in response to Leiter.

In terms of the cultural forces that Horwitz describes, one can see the growing divide between believers and nonbelievers, certainly since the beginning of the twenty-first century.¹²⁹ One obvious starting point is the New Atheist attack on religion that gained momentum during the early years of the twenty-first century.¹³⁰ That loose movement of Richard Dawkins, Sam Harris, Daniel Dennett, and Christopher Hitchens, among others, raised no new arguments against God's existence, but did set the stage for the emergence of a mass anti-religious movement for the first time in America.¹³¹ The culmination of the New Atheist movement was Hitchens' best-seller, *God is Not Great: How Religion Poisons Everything*, originally published in 2007.¹³² That book made clear that the object of attack by the New Atheism was religion in general and not just belief in God per se.¹³³ Shortly before his death in 2011, Hitchens expressed this view in an interview in *The New Statesman* with Richard Dawkins:

The totalitarian, to me, is the enemy - the one that's absolute, the one that wants control over the inside of your head, not just your actions and your taxes. And the origins of that are theocratic, obviously. The beginning of that is the idea that there is a supreme leader, or infallible

127. See, e.g., E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 491 (2009) ("My thesis is that the First Amendment's protection of religious freedom must rest preeminently on the intrinsic character and claims of religion itself. Religion requires special constitutional treatment precisely because it involves something transcendent, objective, normative, and exclusive.").

128. See, e.g., Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 430 (2011).

129. HORWITZ, *supra* note 123, at xiii–xviii.

130. *Id.* at xiii–xiv.

131. For general critical accounts of this rise, see TINA BEATTIE, *THE NEW ATHEISTS: THE TWILIGHT OF REASON AND THE WAR ON RELIGION* (2007) and JOHN F. HAUGHT, *GOD AND THE NEW ATHEISM: A CRITICAL RESPONSE TO DAWKINS, HARRIS AND HITCHENS* (2008).

132. CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007).

133. See *id.* at 17.

pope, or a chief rabbi, or whatever, who can ventriloquise the divine and tell us what to do.¹³⁴

God is just the chief totalitarian, among other totalitarians.

This criticism of religious faith as unthinking was the theme of another cultural marker of the growing distance between believers and nonbelievers—the Reason Rally held on March 24, 2012 in Washington D.C.¹³⁵ While in part an unapologetic declaration of presence on the American stage—“secularism is coming out of the closet” stated the Reason Rally homepage¹³⁶—and while assuring the public that it was not the point of the rally to “trash religion,”¹³⁷ what else is a reason rally other than a celebration of reason associated with the secular and not associated with religion? Religion presumably functions by reliance on sources other than reason—on tradition, for example. As the late Paul Kurtz, who popularized the term “secular humanism” put it, “[m]odern physics and astronomy began by stepping outside religious authority.”¹³⁸

David Niose, president of the American Humanist Association, while maintaining that nonbelievers do not claim a “monopoly on rationality,”¹³⁹ nevertheless described the rally as celebrating those who use reason, in an op-ed published the day before.¹⁴⁰ The piece touted a political realignment in view of the overwhelming political success of religious conservatives and the strong support that nonbelievers routinely deliver to the Democratic Party: “[f]or over three decades, political debates in America have often centered on the issue of appeasing religious conservatives [L]ittle harm could

134. George Eaton, *Preview: Richard Dawkins Interviews Christopher Hitchens*, THE NEW STATESMAN (Dec. 13, 2011, 2:11 PM), <http://www.newstatesman.com/blogs/the-staggers/2011/12/dawkins-hitchens-catholic>.

135. See Press Release, *Reason Rally Marks Turning Point for Secular Movement, American Politics*, REASONRALLY 1 (Mar. 22, 2012), <http://reasonrally.org/wp-content/uploads/2011/09/Reason-Rally-Marks-Turning-Point-for.pdf>.

136. *The Reason Rally: A Celebration of Secular Values*, REASONRALLY.ORG, <http://reasonrally.org/about/> (last visited Dec. 20, 2013).

137. *Id.*

138. PAUL KURTZ, *THE TURBULENT UNIVERSE* 20 (2013).

139. David Niose, Op-Ed., *The Rise of the Secular Political Movement*, PITTSBURGH POST-GAZETTE (Mar. 23, 2013 12:00 AM), <http://www.post-gazette.com/stories/opinion/perspectives/the-rise-of-the-secular-political-movement-627720/>.

140. See *id.*

come from making room at the table for a segment of the population that centers its world view on critical thinking and reason.”¹⁴¹

Obviously, this formulation is meant to contrast nonbelievers with others who do not center their worldview on critical thinking and reason. Leiter participates in this division.

Another recent cultural marker of the increasing distance between believers and nonbelievers was the anti-religion billboard campaign in the spring of 2012 mounted by American Atheists and other groups.¹⁴² Here is how the editors of the online magazine *Religion Dispatches* described the campaign: “This spring, billboards sprouted across the country like cranky, God-hating daffodils. They proclaimed the bad news that God does not exist, that belief is bad for your soul, that religion enslaves”¹⁴³

Anthony Pinn, Professor of Religious Studies at Rice University, described what the campaign aimed at: “Billboards, rallies, biting commentary—all this is meant to deconstruct the cultural worlds framing sacred texts and ideas, and to do deep damage to the stronghold religion has on life in the United States.”¹⁴⁴

Aside from the attack on religion and belief-in-God, there has been another, and even more significant, recent manifestation of secular animosity against religion. In a variety of contexts, religion has been challenged as discriminatory.¹⁴⁵ Part of this narrative of discrimination arises from the opposition of much of American

141. *Id.*

142. See Ben Yakas, *See Monday's Controversial Anti-Religion Billboard, Today!*, GOTHAMIST (Mar. 1, 2012, 5:21 PM), http://gothamist.com/2012/03/01/see_mondays_controversial_anti-reli.php.

143. Anthony B. Pinn, *Can Atheist Billboards Kill Religion?*, RELIGION DISPATCHES (May 1, 2012), http://www.religiondispatches.org/archive/atheologies/5823/can_atheist_billboards_kill_religion/.

144. *Id.*

145. See *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2994–95 (2010); Catherine Poe, *Contraception Battle: Not a War on Religion, But a War on Women*, WASH. TIMES (Feb. 10, 2012), <http://communities.washingtontimes.com/neighborhood/ad-lib/2012/feb/10/contraception-battle-not-war-religion-war-women/>; Hunter Stuart, *Alabama Government Agency Holds Prayer Against Abortion, Gay Marriage*, HUFFINGTON POST (Jul. 23, 2013, 11:47 AM), http://www.huffingtonpost.com/2013/07/25/alabama-prayer-gay-marriage_n_3651756.html; *Vanderbilt University Policy Forces Catholic Group Off Campus*, CATHOLIC NEWS AGENCY (Mar. 29, 2012, 12:07 AM), <http://www.catholicnewsagency.com/news/vanderbilt-university-policy-forces-catholic-group-off-campus/>.

organized religion against gay marriage and abortion.¹⁴⁶ Part of this narrative comes from the fight over the contraception mandate in the Affordable Care Act.¹⁴⁷ Catherine Poe called the mostly religious opposition to that mandate a “war on women” on the Washington Times blog.¹⁴⁸ That phrase is not uncommon among nonbelievers these days.

Perhaps the strangest aspect of the association of religion with discrimination is the fight over membership in religious organizations on college campuses. In *Christian Legal Society v. Martinez*,¹⁴⁹ the United States Supreme Court held that Hastings Law School could condition official recognition of a student group on the group’s willingness to embrace an all-comers policy—that membership and leadership in the group would be open to all students.¹⁵⁰ This precedent could lead to a wave of disaffiliations by religious campus groups. In March 2012, for example, Vanderbilt University forced a Catholic student group off campus when the group would not rescind a requirement that its leaders be Catholic.¹⁵¹ I call this strange because it seems absurd to me that student groups are criticized because they insist on some kind of common commitment for a group—as if the Young Democrats are being close-minded if they insist on the leader of their group having a formal affiliation with the Democratic Party in order to be a leader of their group.

Religious leaders have responded to, or even preempted, these challenges by nonbelievers in a variety of ways that are themselves increasingly combative. At a meeting sponsored by the Ethics and Public Policy Center’s American Religious Freedom Program in May 2012, for example, Richard Land, who heads the Southern Baptist Convention’s Ethics & Religion Liberty Commission, described secular hostility to religion in fundamental political/theological terms: “Secularists don’t like people of faith because the ultimate authority for us is not the state. The ultimate authority is God.”¹⁵²

146. See, e.g., Stuart, *supra* note 145.

147. See Poe, *supra* note 145.

148. *Id.*

149. Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971 (2010).

150. *Id.* at 2994–95.

151. See *Vanderbilt University Policy Forces Catholic Group Off Campus*, *supra* note 145.

152. The Motley Monk, *The Obama Administration’s Attack on Religious Freedom*, THE AMERICAN CATHOLIC (May 25, 2012), <http://the-american-catholic.com/2012/05/25/the-obama-administrations-attack-on-religious-freedom-the-second-vatican-councils-spirit-of-ecumenism-at-work/>.

The main response by believers, and in fact the subject of the May meeting, has been to assert that religious liberty in the United States is under threat and to cite some of the contexts of the attacks by nonbelievers as evidence of that threat.¹⁵³ So, pressure on clergy to cooperate with gay marriage, pressure on religious campus groups to open membership, pressure on believers to participate in providing abortion services, pressure on religious organizations to cooperate in certain forms of law enforcement, and so forth, are all cited as threats against religious believers—as is the general attitude among nonbelievers that religion is a negative social phenomenon.

The U.S. Catholic bishops have been the most vocal and dramatic religious voice of opposition. The bishops urged Catholics and “all people of faith” to observe March 30, 2012 as a day of prayer and fasting for religious freedom.¹⁵⁴ Undoubtedly, the reason the bishops took the lead is that the contraception mandate that is part of the Affordable Care Act does not present a direct threat to the teachings of most Protestant denominations. Nevertheless, the same general tenor has now been adopted by the leadership of many—though certainly not all—religious groups in America.

An aspect of all this rhetoric was undoubtedly the pressure of a Presidential re-election campaign that was regarded by many as a potential watershed event in terms of the long-term health of religious liberty in America.¹⁵⁵ Certainly, since the November 2012 election, the rhetoric on both sides has not been as heated. Nevertheless, the litigation over the contraception mandate is continuing¹⁵⁶ and will

153. *Id.*

154. See *U.S. Bishops Set March 30 as Day of Prayer, Fasting for Religious Liberty*, CATHOLIC SENTINEL, <http://www.catholic sentinel.org/main.asp?SectionID=2&SubSectionID=34&ArticleID=17772> (last visited Dec. 20, 2013) (“The bishops announced the daylong observance in a statement titled ‘United for Religious Freedom’ that was approved March 14 by the U.S. Conference of Catholic Bishops’ Administrative Committee. They asked Catholics and others to join them in ‘prayer and penance for our leaders and for the complete protection of our first freedom—religious liberty—which is not only protected in the laws and customs of our great nation, but rooted in the teachings of our great tradition.’”).

155. See Brian Tashman, *After Obama’s Re-Election, Religious Right Demands Repentance and Resistance*, RIGHT WING WATCH (Nov. 8, 2012, 3:40 PM), <http://www.rightwingwatch.org/content/obama-reelection-religious-right-repentance-resistance> (cataloguing anti-Obama rhetoric from a variety of religious groups and figures).

156. See, e.g., *Franciscan Univ. of Steubenville v. Sebelius*, No. 2:12-CV-440, 2013 WL 1189854, at *5 (S.D. Ohio Mar. 22, 2013) (dismissing Catholic plaintiffs’ suit on ripeness grounds); Cheryl Wetzstein, *Lawsuit Takes on Birth Control Mandate*,

lead to a renewed political focus once a case is accepted for review by the Supreme Court.

What lies in store for the future of legal debates about the role of religion? It is hard to be optimistic about finding common ground between believers and nonbelievers. Increasingly in law, even the starting points in debates about religion are at issue and there often seems to be a failure to communicate. Despite the undoubted presence of goodwill on both sides, believers and nonbelievers have a hard time hearing each other. I cite three illustrations below of what I mean, but first let me describe what I see as happening in more general terms.

Among legal academics on the secular side, a more penetrating critique of religion has emerged—one that refuses to cede to religion a unique normative authority that used to be taken for granted. Leiter is a good example of this tendency. As we have seen, Leiter denies the uniqueness of religion and contests the justification for religious exemptions from generally applicable laws.¹⁵⁷ In terms of the Establishment Clause, there is, at the same time, growing hostility to the presence of religious imagery in the public square, which is also hinted at in Leiter's book.¹⁵⁸

On the other side, legal academics that defend religion are beginning to challenge the traditional assumptions that there can be an adequate secular justification for law and that constitutional law is an appropriate vehicle for the regulation of religion in American public life.¹⁵⁹ This newly assertive religious view seeks to overturn the secular paradigm and return religion to a foundational role undergirding the legitimacy of law.¹⁶⁰ This religious view denies that constitutional law can serve as a neutral referee in disputes about

WASH. TIMES (Dec. 11, 2012),
<http://www.washingtontimes.com/news/2012/dec/11/lawsuit-takes-on-birth-control-mandate/>.

157. LEITER, *supra* note 2, at 1 (discussing one religious exemption from generally applicable laws and one nonreligious exemption).
158. *Id.* at 139–40 n.6 (noting that while atheists and agnostics may sometimes raise exemption issues, their claims really sound in Establishment Clause terms challenging government religiosity).
159. See Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. (SPECIAL ISSUE) 1159, 1161–63 (2013) (arguing that religious truth exists and should form the basis of constitutional interpretation and the ordering of government involvement in public life).
160. See Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision-Making*, 53 CATH. U. L. REV. 709, 718–21 (2004) (exploring several models of secular and religious judicial decision-making and advocating for uniform judicial reliance on religious justifications).

religion and celebrates the Supreme Court's recent turn to standing to avoid deciding Establishment Clause cases.¹⁶¹ Under this scenario, the role of religion in public life is to be left to democratic forces to determine or is to be judicially protected from a religiously justified standpoint.¹⁶²

Three recent and well-known events in the American legal academy illustrate these tendencies: a panel at a January 2012 Association of American Law Schools (AALS) meeting over the ministerial exception case, *Hosanna-Tabor v. EEOC*,¹⁶³ a November 2011 debate at Georgetown Law School between Michael McConnell and Noah Feldman concerning whether religious liberty is special,¹⁶⁴ and the Religious Legal Theory conference at Pepperdine Law School in February 2012.¹⁶⁵ Nothing that occurred at these events diverged from positions already present in the scholarly literature, but the juxtaposition of these three events seemed to mark a defining moment in relations among believing and nonbelieving law faculty.¹⁶⁶

The AALS panel, entitled *Church Autonomy, the Ministerial Exception and Hosanna-Tabor v. EEOC*, took place on Saturday, January 7, 2012, just a few days before the decision came down unanimously upholding the concept of the ministerial exception (January 11).¹⁶⁷ The participants on the panel were well-known in the field.¹⁶⁸ Douglas Laycock, for example, perhaps the most influential

161. *Id.* at 732–33; see *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 593 (2007) (holding that the plaintiffs lacked standing to challenge government funding of faith-based initiatives).

162. See Modak-Truran, *supra* note 160, at 731–33.

163. *Final Program: Academic Freedom and Academic Duty*, ASS'N AM. L. SCHS. XXVIII, 55, Dec. 9, 2011, <http://www.aals.org/am2012/2012program.pdf> [hereinafter *Final Program*].

164. Noah Feldman & Michael McConnell, Keynote Debate at the Berkley Center for Religion, Peace & World Affairs Conference: Is Religious Freedom an Independent or Derivative Right? (Nov. 17, 2011), *available at* <http://berkeleycenter.georgetown.edu/events/what-s-so-special-about-religious-freedom>.

165. Pepperdine Univ. Sch. of Law Conference: The Competing Claims of Law and Religion: Who Should Influence Whom? (Feb. 23–25, 2012) (conference agenda and program may be viewed at <https://law.pepperdine.edu/nootbaar/news-events/events/law-and-religion/Nootbaar-Law-and-Religion-Brochure.pdf>).

166. For an earlier reference of the tensions between believers and nonbelievers on law school faculties, see STEVEN D. SMITH, *LAW'S QUANDARY* 34–35 (2004).

167. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012); *Final Program*, *supra* note 163, at XXVII–XXVIII.

168. Richard W. Garnett of Notre Dame Law School was the moderator. The speakers were Caroline Mala Corbin, University of Miami School of Law, Leslie C. Griffin,

neutrality theorist in the country, argued the case for the Lutheran Church, and most of the other participants were involved in preparing briefs on one side or the other in the Supreme Court.¹⁶⁹

Listening to the presentations, I was amazed at the divergence of the starting points, which one would not necessarily expect, even in a controversial legal dispute. As if to emphasize that there is a gender divide in the academy over matters of religion, both Leslie Griffin and Caroline Mala Corbin argued that religion should not be above the law, a framework that Laycock strongly rejected. He and Robert Tuttle emphasized the autonomy of religion in American history, a special status that did not seem at all to move Corbin and Griffin. The latter wanted to subsume religious liberty under a broader heading of associational freedom, much as Leiter would subsume it under the rubric of conscience.

The divide on the panel was reflected indirectly in the opinion in *Hosanna-Tabor* that came down a few days later.¹⁷⁰ Chief Justice Roberts' opinion rejected the government's position that there is no such thing as a ministerial exception, and that churches and other religious organizations must rely on "the constitutional right to freedom of association" rather than any right "grounded in the Religion Clauses themselves."¹⁷¹ The Chief Justice called the government's position "that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers," a "remarkable view,"¹⁷² which was surely not an admiring comment.

How often has it occurred that the federal government argues a case to the Supreme Court and loses unanimously in this way at the starting point of analysis? It must be rare. It seems to me that the

University of Houston Law Center, Douglas Laycock, University of Virginia School of Law, Christopher C. Lund, Wayne State University Law School, and Robert W. Tuttle, The George Washington University Law School. *Final Program*, *supra* note 163, at XXVII, XXVIII.

169. See Brief for Professor Eugene Volokh et al. as Amici Curiae Supporting Petitioner, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 2470847 (prepared in part by Richard Garnett); Brief for Law and Religion Professors as Amici Curiae Supporting Respondents, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 2470847 (prepared in part by Caroline Mala Corbin and Leslie C. Griffin); Brief for the Lutheran Church – Missouri Synod as Amici Curiae Supporting Petitioner, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553), 2011 WL 2470848 (prepared in part by Christopher C. Lund); Audrey Waldrop, *Prof. Goes to High Court*, CAVALIER DAILY, Oct. 6, 2011, <http://www.cavalierdaily.com/article/2011/10/prof-goes-to-high-court>.

170. See generally *Hosanna-Tabor*, 132 S. Ct. at 704–06 (reciting and following the Supreme Court's precedent of providing legal autonomy to religion).

171. *Id.* at 706.

172. *Id.*

Justices were reflecting a worldview that took the preferred and special status of religion for granted and seemed startled at the notion that religion is not special and might have to fend for itself along with other claimants of nonreligious associational freedom.

This clash of worldviews was also on display in the McConnell-Feldman debate.¹⁷³ Feldman claimed that the presence of protections for religion in the Constitution is merely a historical contingency and challenged McConnell to justify normatively the claimed special status of religion—by which Feldman meant claims to exemptions from what the *Smith* opinion called “neutral laws of general applicability,”¹⁷⁴ to which the Free Exercise Clause was said in that case to provide no protection.

Chief Justice Roberts’ opinion in *Hosanna-Tabor* denied that *Smith* contradicted the result in that case—recognition of the ministerial exception to neutral laws—because *Smith* concerned individual conduct versus the institutional integrity that was at issue in *Hosanna-Tabor*.¹⁷⁵ But from Feldman’s perspective, it would follow that whatever protections religious institutions enjoy should be enjoyed by institutions associated with other morally serious commitments, such as the Sierra Club, or the Federalist Society. If *Smith* is to be superseded by statutory protections for religion, those protections should also be available to nonreligious claims of conscience.

Challenges to the settled assumptions of law and religion were also present at the third Religious Legal Theory conference at Pepperdine.¹⁷⁶ However, these challenges came primarily from a newly assertive pro-religion perspective. The opening speaker at the conference, Michael Stokes Paulsen, challenged the Feldman position (without reference to Feldman himself), arguing that the Vietnam draft cases, which applied religious exemptions to persons who were

173. Feldman & McConnell, *supra* note 164.

174. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 886 n.3 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)). Justice Scalia’s majority opinion was responding to Justice O’Connor’s characterization, but he accepted it as a fair summary of his opinion.

175. *Hosanna-Tabor*, 132 S. Ct. at 707.

176. The various talks are all available for viewing. *The Competing Claims of Law and Religion: Who Should Influence Whom?*, PEPPERDINE UNIV. SCH. OF L. (Feb. 23–25, 2012) (downloaded using iTunes). A number of the talks have been gathered in a special issue of the Pepperdine Law Review. Symposium, *The Competing Claims of Law and Religion*, 39 PEPP. L. REV. (SPECIAL ISSUE) 1051 (2013).

not traditional believers, went too far.¹⁷⁷ According to Paulsen, religious and secular claims to liberty are different. The recognition of God's, or the gods', claims on believers is the basis for the religion clauses in the Constitution.¹⁷⁸ This theory amounts to a religious defense of religious liberty that denied a secular foundation to the constitutional right—as was noted in response by commentator Eugene Volokh.¹⁷⁹

Another of the plenary presenters, James Davison Hunter, presented an additional aspect of the newly assertive religious narrative, arguing that the secularization thesis is being debunked and that we are in a post-secular period in which the model of distinct spheres between religion and the secular (the model present in the *Hosanna-Tabor* opinion) is overdrawn.¹⁸⁰ Nor is the current constitutional regime neutral as between religion and the secular, but rather represents a promotion of secularism.¹⁸¹

Steven Smith, a very well-known figure in law and religion circles, asked directly in the same plenary session in which Professor Hunter spoke, “is secularism in crisis?,” which he answered in the affirmative.¹⁸² Professor Smith echoed the claim that the secularization thesis has failed and that the neutrality that law has claimed is not neutral.¹⁸³

But the clearest challenge to the traditional law and religion paradigm was the attempt to reinterpret the foundations of law, and the legitimacy of law, from theological sources. Zachary Calo put this claim most succinctly when he spoke of freeing law from its secular captivity.¹⁸⁴ Other speakers at the conference, notably David Opderbeck, and, from a different angle, Mark Modak-Truran, also challenged the secular foundations of law.¹⁸⁵

177. See Paulsen, *supra* note 159, at 1196–1203.

178. See *id.* at 1163–64.

179. See Eugene Volokh, *The Priority of Law: A Response to Michael Stokes Paulsen*, 39 PEPP. L. REV. (SPECIAL ISSUE) 1223, 1225–29 (2013).

180. See James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. (SPECIAL ISSUE) 1065, 1070–71 (2013).

181. See *id.* at 1078.

182. *Law, Religion, and the Common Good: Reflections on Challenges of Late Modernity on The Competing Claims of Law and Religion: Who Should Influence Whom?*, PEPPERDINE UNIV. SCH. OF L. (Feb. 23–25, 2012) (downloaded using iTunes).

183. *Id.* Professor Smith's presentation was not included in the Law Review issue.

184. Zachary R. Calo, *Faithful Presence and Theological Jurisprudence: A Response to James Davison Hunter*, 39 PEPP. L. REV. (SPECIAL ISSUE) 1083, 1083 (2013).

185. *Who Should Influence Whom on The Competing Claims of Law and Religion: Who Should Influence Whom?*, PEPPERDINE UNIV. SCH. OF L. (Feb. 23–25, 2012) (downloaded using iTunes); *Secularization on The Competing Claims of Law and*

The conference was not monolithic. Micah Schwartzman, for example, strongly echoed and deepened the Feldman and Leiter position that there is nothing distinctively normative in religion to warrant special protections from generally applicable laws.¹⁸⁶ In fact, an increasing conflict of worldviews was visible at the conference. Some defenders of religion in the legal academy are clearly set on reclaiming ground they feel has been illegitimately ceded to the secular. In contrast with these religious voices, the secularly oriented do not share the view that secularism is in crisis. They are not willing to accept a more religiously based legal regime.

The similarities and differences between many believers and nonbelievers in the context of increasing distance over the importance of religion may be summarized as follows. For the believer, religion is different from nonreligion—belief from nonbelief. They are mutually exclusive categories and can each be defined, at least to some extent. Of the two categories, religion is of special significance, compared to any of the moral commitments that a nonbeliever might have. For the nonbeliever, religion is also different from nonreligion—belief from nonbelief. But, in contrast to the believer, the nonbeliever does not consider religion to be of unique significance. The moral commitments of the nonbeliever are of equal normative weight compared to religious commitments.

This is why the believers and nonbelievers disagree about the justification for religious exemptions from generally applicable laws. Although both agree that religion can be distinguished from nonreligion, for the nonbeliever, extending exemptions to religious belief only is not justified.¹⁸⁷ For the believer, in contrast, such restricted religious exemptions are usually justified.¹⁸⁸ The growing gap between believers and nonbelievers can thus be seen to begin,

Religion: Who Should Influence Whom?, PEPPERDINE UNIV. SCH. OF LAW (Feb. 23, 2012) (downloaded using iTunes).

186. Professor Schwartzman published an article based on this presentation. Micah Schwartzman, *What If Religion is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). Schwartzman endorses the analogical approach to granting religious exemptions to secular beliefs and indeed endorses and constitutionalizes the Vietnam draft cases in a manner similar to that of this article. *See id.* at 1419–20. Not surprisingly, the fundamental difference between us lies in the conceptualization of claims like those in *Seeger* and *Welsh*. For Schwartzman, those not affiliated with traditional religions remain “nonbelievers” with “secular doctrines that cannot be distinguished . . . from their religious counterparts.” *Id.* at 1421. Schwartzman cannot ask, what if we are all religious, even though many of his conclusions would be the same.

187. *See* LEITER, *supra* note 2, at 132–33.

188. *See id.* at 92–93.

surprisingly, in an agreement between the two sides that religion and nonreligion—belief and nonbelief—are different. This, as shown above, is specifically Leiter's starting point. Thus, generally, critics of religion who favor Leiter's Anti-Religion Equality Project and defenders of religion, who reject it, share this same starting point concerning the difference between religion and nonreligion.¹⁸⁹

IV. EVALUATING LEITER'S PROJECT

When *Why Tolerate Religion?* is discussed, the first point raised is generally whether Leiter has succeeded in showing that religious conscience is entitled to no greater level of protection than is nonreligious conscience.¹⁹⁰ Leiter himself begins his book with this question of special protections for religion.¹⁹¹

To make the case against the special value of religion, however, one must be able to distinguish religious conscience from nonreligious conscience, which means distinguishing religion as a separate realm. That requires a definition of religion, which Leiter attempts to give.¹⁹² Does he succeed?

As stated above, Leiter attempts in Chapter 2 to define religion in terms of the nature of its demands on the believer vis-à-vis generally applicable law.¹⁹³ Leiter presents three characteristics of religion that he claims distinguish it from other realms of conscience: religion issues in categorical demands on action, it does not answer ultimately

189. See Schwartzman, *supra* note 186, at 1370 (stating that religion is different from nonreligion); see also Feldman & McConnell, *supra* note 164.

190. See, e.g., Robert Merrihew Adams, *Why Tolerate Religion?*, NOTRE DAME PHIL. REV. (Jan. 6, 2013) (book review), <http://ndpr.nd.edu/news/36599-why-tolerate-religion/>; Stanley Fish, Op-Ed., *Religious Exemptions and the Liberal State: A Christmas Column*, N.Y. TIMES, Dec. 24, 2012, <http://opinionator.blogs.nytimes.com/2012/12/24/religious-exemptions-and-the-liberal-state-a-christmas-column>; Book Notes, 38 LAW & SOC. INQUIRY 538, 544 (2013) ("[Leiter's] book addresses the philosophical and constitutional puzzle of why religion is singled out for preferential treatment in law and public discourse in the United States, for example, why religious obligations that conflict with the law are recorded toleration while other obligations of conscience are not.").

191. The book opens with the two instances of claimed exemptions from a generally applicable weapons ban in public school: one religiously-based and one not. See LEITER, *supra* note 2, at 1–3.

192. See *id.* at 31–37.

193. Despite referring to a definition of religion, it is not clear that Leiter really is trying to define religion in general. See *id.* at 34–37. There are no references to, or discussion of, rites, practices, or rituals as typical defining characteristics of religion. See *id.* at 31–37. It might be more accurate to say that Leiter is attempting to define the demands of religious conscience rather than attempting to define religion itself.

to evidence and reason, and it renders death and suffering intelligible.¹⁹⁴

Of these three characteristics, only one—the insulation from evidence—is really held by Leiter to apply to religion alone. Leiter admits that certain systems of morality in principle also issue in categorical demands, though he claims that as a practical matter only religion gives much effect to this categoricity.¹⁹⁵ Obviously, the fact that only a small number of people act categorically on the basis of morality, thus contradicting Leiter’s definition of religion, does not remove the contradiction. Morality can issue in categorical demands on behavior. Therefore, categorical demand on action is not a unique characteristic of religion.

Similarly, Leiter states very clearly that “nonreligious individuals find ways of achieving *existential* consolation” without engaging in religion.¹⁹⁶ So, this characteristic also does not distinguish religion uniquely.

The characteristic of religion that remains, and indeed the one that does all the work in Leiter’s book of distinguishing and devaluing religious claims of conscience, is the claimed insulation from reason and evidence.¹⁹⁷ How convincing is Leiter’s claim that there are at least some central beliefs of every religion that do not ultimately answer to evidence and reason?

This is not an easy matter, but overall Leiter’s position is either false or at least drastically overstated. In the first place, we all decide matters, even important matters, without reference to reason and evidence.¹⁹⁸ Leiter undoubtedly would respond that, while this may be true, outside the religious realm, people can at least change our minds in light of new evidence. But how often do we actually do this?¹⁹⁹ How many business people changed their minds about the efficient market hypothesis after the collapse of financial markets in 2008? How many liberals changed their minds about President Reagan’s policies after the collapse of the Soviet Union? Paul

194. *Id.* at 34, 52.

195. *See id.* at 38–39.

196. *Id.* at 62.

197. For example, the main reason Leiter gives for not respecting religion in chapter 4 is the insulation of religion from evidence. *See id.* at 81.

198. *See* LEONARD MLODINOW, *SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR* (2012).

199. John Gray made this similar point in his review of Leiter in *New Statesman*. John Gray, *Why Tolerate Religion? Most of Our Beliefs are Unwarranted, Even Absurd*, *Says John Gray*, *NEW STATESMAN*, Nov. 29, 2010, <http://www.newstatesman.com/print/culture/culture/2012/11/giant-leaps-mankind>.

Krugman has been complaining for quite some time that despite all of the evidence showing that austerity policies have failed to generate economic growth, people keep on proposing austerity as a program to combat our economic ills.²⁰⁰

Leiter might say this is all a matter of degree. Religious dogmas are even *less* subject to disproof than are other kinds of beliefs. But I wonder if he is right. He certainly adduces no evidence to show this. He just assumes it out of a kind of secular prejudice against the rationality of religion.

It is not even clear what Leiter means by “insulated from reason” and evidence.²⁰¹ When Leiter refers to “ordinary standards of reasons and evidence in common sense and the sciences,”²⁰² he is claiming, in effect, that everyone knows—it is a matter of common sense—that miracles are impossible and angels don’t exist. While I agree with Leiter on these matters, I am also aware that most people do not agree with him or with me, and that they have their reasons for not agreeing. Leiter fails to acknowledge that the reasons that support certain religious beliefs are not unreasonable.

Take two famous examples: the writing of the Qur’an and the resurrection of Jesus. In terms of the Qur’an, sincere Muslims have asked me whether, given all we know historically about the Prophet Mohammed, I really believe that Mohammed alone wrote the Qur’an. The fact is that I don’t believe that. It does not seem possible. I simply assume, irrefutably, as I am certain Leiter assumes as well, that the Qur’an was not dictated to the Prophet Mohammed by an angel, as the tradition asserts. But, I recognize that this is just my assumption. The assumption that dictation by an angel would be impossible does not answer, however, the question of how the Qur’an came to be written.

In terms of the resurrection, N.T. Wright has firmly pressed the argument that, given all we know, the resurrection must actually have happened.²⁰³ Certainly, something strange must have happened. It is more likely that the Taliban would begin holding cocktail parties than it is that pious Jews of the 1st century A.D. would countenance eating pork a few years after the death of Jesus, unless *something* extraordinary had happened.

200. See Paul Krugman, *How the Case for Austerity Has Crumbled*, N.Y. REV. BOOKS, June 6, 2013, <http://www.nybooks.com/articles/archives/2013/jun/06/how-case-austerity-has-crumbled/>.

201. LEITER, *supra* note 2, at 81.

202. *Id.*

203. 3 N.T. WRIGHT, *THE RESURRECTION OF THE SON OF GOD* 717 (2003).

As to the nature of that “something,” the question is: what did happen to the body of Jesus? There seems to be no historical reason to doubt that Temple authorities began to persecute the nascent Jesus movement shortly after the crucifixion. Since rumors of the resurrection apparently circulated soon after the crucifixion, it may be inferred that the Temple authorities would have announced the location of Jesus’ body, if they had known where it was in order to discredit the new heretical movement. Conversely, it would take an extreme anachronism to suppose that pious Jews buried Jesus and knew where his body lay, but kept quiet in order to manipulate public opinion about the resurrection. The third possibility is that no one cared where Jesus was buried, and therefore the knowledge of the location was lost. But this seems unlikely, given the public nature and scandal of crucifixion itself.

I realize that this does not prove anything. People like Leiter and me believe the resurrection did not happen because nothing like resurrection can happen, based on the laws science has discovered. I just wish Leiter would acknowledge that both my position and his are based on a pre-existing worldview. He and I are not considering the possibility of angels and resurrection and are not really weighing the evidence.

Not only do all human beings come to conclusions without reasons sometimes, and maybe even most of the time, and not only are there reasons adducible to support religious doctrines Leiter finds epistemologically unwarranted, but it is an exaggeration that religious belief does not respond to the kinds of scientific and common sense arguments that Leiter considers normative. The power of scientific conclusions over even highly conservative religious believers is demonstrated by the insistence in the debates over the teaching of evolution in the public schools that “evolution “is only a theory.”²⁰⁴ If evolution is only a theory, then the religious believer can oppose it without opposing science itself.

This formal deference by religious believers to science, at least theoretically, is also why the alleged weaknesses in evolutionary theory—the supposed impossibility of evolving an eye, for example²⁰⁵—are deemed to be so significant by supporters of a

204. See, e.g., Mark Isaak, *Five Major Misconceptions About Evolution*, TALKORIGINS (Oct. 1, 2003), <http://www.talkorigins.org/faqs/faq-misconceptions.html>.

205. This criticism is voiced so frequently that it has its own rebuttal by evolutionists. See *Is the Eye Too Complex to Have Evolved Naturally?*, EVOLUTION FAQ, <http://www.evolutionfaq.com/faq/eye-too-complex-have-evolved-naturally> (last visited Dec. 20, 2013).

biblically based account of creation. Where possible, there is a clear desire to be at home with science and not to directly confront it.

Nor is this strategy merely a means to avoid judicial condemnation of creationism under the Establishment Clause. The epistemological basis of this religious evolution strategy is demonstrated by the relative absence of challenges to the teaching of geology in the public schools. At one time, the age of the earth might also have been challenged “as only a theory” in light of the literal reading of Genesis that shows the world to be only a few thousand years old.²⁰⁶ This “age of the earth” challenge to accepted scientific orthodoxy has collapsed not because it was not as essential to, or inherent in, Christian thought at one time as was opposition to evolutionary theory, but because of the seemingly insurmountable scientific support for a range of interconnected dating techniques that show a universe 13.8 billion years old and an earth around 4.5 billion years old.²⁰⁷

But even if Leiter were accurate in his description of some monotheistic sects as resistant to “evidence and reason,” his definition of religion would still fall short, because, to serve Leiter’s purpose, his description must apply to all religions and to religion uniquely. It is easy to see that resistance to what Leiter considers evidence and reason is not unique to religion, but it is also obvious that different religious traditions are resistant to scientific discoveries to differing extents. Indeed, the differing degrees of acceptance or hostility to the scientific revolutions of the modern age are one of the markers of a liberal versus an orthodox and conservative Christianity.²⁰⁸

Leiter knows that he has a quandary here and he deals with it in an almost shameful way—by dismissing with the merest nod the work of people like William Alston and Alvin Plantinga as “nothing more than an effort to insulate religious faith from ordinary standards of

206. Most specifically, if not most famously, Archbishop James Ussher, in 1658, calculated the moment of creation as occurring on the night preceding Sunday, October 23, 4004 BC. JAMES USSHER, *THE ANNALS OF THE WORLD* 7–8 (1658).

207. See *The Origin of the Universe – Three Views*, MUSINGS ON SCI. & THEOLOGY (Aug. 13, 2013), <http://musingsonscience.wordpress.com/2013/08/13/the-origin-of-the-universe-three-views/>.

208. “We are well aware that there is a lot of traditional Christian theology that has to be revised in light of our contemporary scientific understanding, and that there are things that must simply be discarded. That’s what being a Liberal Christian is about.” James F. McGrath, *Evolution and Liberal Christianity*, PATHEOS (June 4, 2009), <http://www.patheos.com/blogs/exploringourmatrix/2009/06/evolution-and-liberal-christianity.html>.

reasons and evidence in common sense and the sciences”²⁰⁹ Leiter also dismisses the entire “intellectualist” tradition in religious thought, including William Paley and Thomas Aquinas, as “post-hoc-rationalization,” because “it never turns out that the fundamental beliefs are revised in light of new evidence.”²¹⁰

It is not true that in these religious traditions fundamental beliefs have not been revised. Fundamental beliefs are not repudiated, but they come to be interpreted very differently.²¹¹ The “Cosmic Christ” of Teilhard de Chardin, for example, is obviously exquisitely sensitive to the findings of the scientific age.²¹² Leiter might insist here that efforts like these are unpersuasively vague or mystical. He might not be able to appreciate that efforts by believers to stretch language to reach transcendent religious truths are the way that religious believers who do accept the scientific tradition reinterpret the historic doctrines of their religions. Such responses may not be the way that Leiter would prefer that believers respond to evidence and reason, but these are responses that are clearly not *insulated* from evidence and reason.

209. LEITER, *supra* note 2, at 81.

210. *Id.* at 39–40.

211. Robert Adams has made just this point in criticizing Leiter on this point: “Unless by ‘revised’ Leiter means *completely abandoned*, this claim is simply false.” Adams, *supra* note 190.

212. See, for example, how Louis M. Savary explains the Cosmic Christ concept from de Chardin in an excerpt from his book, *The Divine Milieu Explained*:

In The Spiritual Exercises, St. Ignatius taught Teilhard how to dig deeply into the mind and heart of Jesus of Nazareth and how to be transformed by his suffering, death, and resurrection. In the sixteenth century when Ignatius lived, he knew nothing of the many scientific facts that are simply part of our daily assumptions about reality. For most people then, the flat earth was the center of God’s creation, and God lived up in the sky. And his traditional spirituality reflects those beliefs In The Divine Milieu, Teilhard the scientist takes us many centuries further in the life of Christ. He invites us to learn to see, as he does, not only the Christ of 2,000 years ago, but also the magnificent Being that the Risen Christ with his Total Body has developed into during two millennia. He also invites us to glimpse into Christ’s future, to identify the goal toward which that Total Body of Christ has been constantly evolving.

For the moment, let us assume that my criticism shows that Leiter fails in his effort to define religion as a realm separate from nonreligious conscientious belief. Does that make any difference to Leiter's ultimate conclusion?

The answer is no, but this seems counterintuitive, even preposterous. Leiter's book is all about religion. How can his fundamental failure to engage that very topic successfully turn out to mean nothing?

The answer to that question lies in the peculiar terms of the *is religion special?* debate. That debate has always assumed that religion and nonreligion must be two distinct categories.²¹³ That assumption was at its most peculiar display in the debate between Feldman and McConnell, adverted to above, in which, at a certain point, the two participants argued over whether Antigone's demand of conscience was religious or philosophical.²¹⁴

On reflection, it is obvious that a question like this—whether a character in ancient Greek drama is reflecting modern categories of belief and nonbelief—is simply incoherent. Philosophy and religion were intertwined in that age.²¹⁵ To be fair, Professor McConnell appeared in the debate to be uncertain about how to answer such a question, perhaps because the question seemed so strange. But the fact that neither participant in the debate expressly stated the obvious—that the distinction between philosophy and religion could not be made in our terms in that context—demonstrates the agendas that distort discussion of the question whether religion is “special.” Defenders of religion, like McConnell, do not wish to admit religion's shared connection with all human endeavors that seek meaning in existence, because they believe to do so would surrender special prerogatives that religion now enjoys both legally and culturally.²¹⁶ Conversely, those who challenge religion, like Feldman, do not wish to admit that the category of religion is potentially vast, because the origins of their challenge lie in a modernist, rationalist skepticism that views religion as an

213. See Feldman & McConnell, *supra* note 164 (posing the question of whether Antigone's actions were motivated by her religious or philosophical beliefs, demonstrating the assumption that the two categories are distinct).

214. *Id.*

215. See generally PIERRE HADOT, *PHILOSOPHY AS A WAY OF LIFE: SPIRITUAL EXERCISES FROM SOCRATES TO FOUCAULT* (Arnold I. Davidson ed., Michael Chase trans. 1995) (explaining that religion and philosophy were so related that there was a constant conflict between Christians and pagans due to each group borrowing concepts from the other).

216. See Feldman & McConnell, *supra* note 164.

indefensible, supernatural-based endeavor.²¹⁷ If religion were viewed in a fuller and richer context, that skeptical challenge would collapse.

Leiter takes the debate, *is religion special?*, one more step. Unlike Feldman, Leiter does not stop at comparing two separate realms—religious conscience and nonreligious conscience—and concluding that they are of equal weight. Instead, Leiter argues that religious conscience is just a particular form of conscientious commitment.²¹⁸ Leiter then concludes that no form of conscientious commitment justifies exemption from generally applicable laws.²¹⁹

For all Leiter's endeavor to define religion, therefore, religion ultimately disappears in his argument as a separate category. That is why Leiter's failure to define religion adequately does not affect his conclusion. If Leiter, instead of attempting to define religion as a separate realm, had admitted that religion cannot easily be defined, that it shares a number of Wittgenstein family resemblances,²²⁰ he could still have concluded that all of these forms of conscience could be subsumed under conscience generally and that all such conscience claims should be subordinated to the pursuit of the common good by the state.

Leiter's conclusion that there is no principled justification for exemption from generally applicable laws vindicates the fear of defenders of religion that losing the debate over the special value of religion will ultimately undermine religious liberty. Ironically, Leiter's project makes it clear that the subsumption of religion into conscience also potentially threatens nonreligious liberty of conscience.²²¹ Leiter's conclusion is not about religion at all, but is about the dominance of the demands of the state.²²² In Leiter's world, we are all equal, believers and nonbelievers, and we are all subservient to the state.²²³ This is the conclusion of the Anti-Religion Equality Project.

But what if Leiter's failure to define religion as a separate category were turned on its head? Is it possible that religion is not easily defined as a separate category because most people most of the time,

217. *Id.*

218. LEITER, *supra* note 2, at 64.

219. *Id.* at 101.

220. Wittgenstein famously stated that the concept of a game could not be defined by rigid characteristics, but only by "family resemblances." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31e–32e (G.E.M. Anscombe trans., 2nd ed. 1958).

221. *See* LEITER, *supra* note 2, at 59.

222. *See id.* at 14–15.

223. *See id.*

and maybe all people at least some of the time, are engaged in religious quests? If that were understood to be the case, we would all be equal, as Leiter suggests, but the state would not necessarily be dominant. In the next part of this article, I attempt to unfold that Pro-Religion Equality Project.

V. THE PRO-RELIGION EQUALITY PROJECT

What should the realm of conscientious belief be called? Certainly, that realm includes many beliefs that are not conventionally considered religions. So, perhaps the entire realm should be called conscience, which is Leiter's approach.²²⁴ But that realm also includes much of conventional religious belief. So, perhaps the realm should all be called religious.

One way to resolve this question would be to allow the participants to define their own categories. If we proceed that way, many participants in organized religions would insist that their beliefs are "religious" while the beliefs of persons not associated with organized religion are generally not "religious." Similarly, many persons who are not a part of organized religions would agree that their beliefs are not "religious," while the beliefs of people who are a part of organized religions are "religious." This is what was meant above—that the participants in the *is religion special?* debate insist that religion and nonreligion are two separate realms.

But I am not going to allow the participants in the debate to define their own positions. The participants in this debate are overstating, and thus enhancing, our differences. For reasons of their own agendas, they treat relative differences between believers and nonbelievers as absolute. In fact, most believers and nonbelievers have a great deal in common.

But even assuming that the participants on both sides in this debate are wrong and there are not two separate realms, the question still remains: whether it is best to speak generally of conscience or of religion? Another way to proceed at this point would be to define religion broadly and then to insist that all manifestations of conscience fit into that definition. I cannot avoid doing a little of that as the reader will soon see, but general definitions of religion are not going to be of much help in determining the reach of religious exemptions.²²⁵ Religion is simply too vast a phenomenon.

224. See *id.* at 17.

225. I agree entirely with Nelson Tebbe's comprehensive analysis on this point. See Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1115 (2011). Jeffrey Lipshaw has also criticized the either/or definitional approach in this context. Jeffrey M. Lipshaw,

Wittgenstein is right that we are not dealing with definitions, but with family resemblances.²²⁶ The question of religion or conscience cannot be decided by overarching definitions.

So I will start at a more modest point. The context with which we are concerned is not religion in general or conscience in general. Rather, we are dealing with religious exemptions from generally applicable laws. Therefore, of the three qualities of religion in Leiter's definition—categorical demands, insulation from evidence and reason, and existential comfort—the most important quality is the issuance of categorical demands. For these types of demands are what bring the individual, conventionally religious or not, into conflict with the laws of the state.

What is a categorical demand? Leiter defines it as a “demand[] that must be satisfied no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers up”²²⁷ Remember that though Leiter is here defining religion, he would agree that nonreligious conscience can also make demands like this.²²⁸

Let us take the example of the conscientious vegan. This person is going to resist any demand by the state to eat meat. The conscientious vegan is going to be willing to suffer sanctions rather than submit to such a demand.²²⁹

What accounts for this conscientious belief and willingness to suffer? It must be more than a general belief about how one should live. If someone believes, for example, that people should regularly exercise, that person would not be willing to go to jail for the sake of exercise if the state were to forbid it. The vegan who had simply concluded that eating meat is bad for one's health, would have no reason to go to jail, which is obviously very bad for one's health, rather than eat meat.

It seems obvious that a vegan who is willing to suffer serious consequences to avoid eating meat must have concluded that killing animals and eating them is wrong. This is the core of Leiter's categorical demand. The person who feels that she must oppose the

Can There Be a Religion of Reasons? A Response to Leiter's Circular Conception of Religious Belief, 26 J.L. & RELIGION 43, 45–46 (2010–2011).

226. WITTGENSTEIN, *supra* note 220, at 31e–32e.

227. LEITER, *supra* note 2, at 34.

228. *See id.*

229. I recognize that among conscientious vegans, there will be differing levels of commitment and willingness to suffer. But that is obviously true of religious believers as well.

commands of the state despite the obvious harm this will do to her own self-interest must be a moral realist who has concluded that the state's demand is objectively wrong. The conscientious vegan does not say, "eating meat is wrong in my opinion"—or if she does, she does so for reasons of political correctness and does not really mean it. She means that eating meat is morally wrong for everyone. The force of a categorical demand is heard in Martin Luther's cry: "Here I stand. I can do nothing else."²³⁰

The use of the Luther example is intentional because demands like this are usually associated with traditional religion. Such demands need not be commands by a God, though they are often believed to be such. A Buddhist, for example, might believe that it is wrong to kill or harm living beings without believing that there is a supernatural being issuing a command to that effect. Even though not necessarily theistic, categorical demands have usually been grounded in some form of traditional religion, which is a category that is widely understood.²³¹

Nevertheless, despite this history, the commitment to objective morality need not be called religious. I have asserted that the tradition of moral realism is not a religious position, but a philosophical one.²³² My change in terminology here has to do with the different roles of the Establishment Clause and the Free Exercise Clause.²³³

As I have argued elsewhere, moral realism, or the theory of objective value²³⁴—the belief that right and wrong are not just matters of opinion, but have to do with the nature of human beings and the nature of the universe—is shared by all the great wisdom traditions.²³⁵ It is, in the words of C.S. Lewis, "the belief that certain attitudes are really true, and others really false, to the kind of thing

230. ALAN ACKERMAN, *JUST WORDS* 98 (2013). This is often quoted as Luther's response before the Diet of Worms, but absent from eyewitness accounts. I know there are people who will say at this point that a moral subjectivist is also capable of standing up for a moral principle, even at great cost. The late Richard Rorty was undoubtedly such a person. I must admit that I simply cannot understand that position. I cannot understand why anyone would suffer for the sake of a mere preference. *But see, e.g.,* S.T. JOSHI, *GOD'S DEFENDERS* 115 (2003) (explaining the motivation of moral subjectivists to propagate the spread of their preferences).

231. *See* LEITER, *supra* note 2, at 138 n.6.

232. *See* Bruce Ledewitz, *Seeking 'Common Ground': A Secular Statement*, 38 *HASTINGS CONST. L.Q.* 49, 74 (2010).

233. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 827–28 (1978).

234. I use these terms interchangeably.

235. *See* BRUCE LEDEWITZ, *CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM* 106 (2011).

the universe is and the kind of things we are.”²³⁶ This commitment can be called religious or nonreligious depending on the context.²³⁷

In Establishment Clause terms, the commitment to objective values cannot be considered an establishment of religion, because then the government could not teach moral realism or objective values without violating the Constitution.²³⁸ It is hard to imagine public elementary school instruction along relativist lines—would kindergarten teachers remind students that “in our culture, we take turns and do not take what does not belong to us?” The category of religion in the context of the Establishment Clause must be interpreted more narrowly than that.

But in the context of free exercise values, the commitment to objective value is the very ground from which all categorical demands emerge. Religion in the context of free exercise and related statutory protections should be seen in precisely these broad terms. Religion in the sense of the tradition of objective values is the common ground that unites most of us in the face of the challenges of relativism and nihilism.

There is nothing arbitrary in calling the commitment to objective values religious in this general sense. I will return to Ronald Dworkin’s understanding of religion just before his death in the last Part of this article. But in an earlier view, in 1992, Dworkin argued that the commitment to the objectivity of values is a preeminent aspect of religion.²³⁹ In context, Dworkin was criticizing pro-life legislation as religiously motivated and thus potentially a violation of the Establishment Clause.²⁴⁰ Dworkin wrote that:

the belief that the value of human life transcends its value for the creature whose life it is—that human life is objectively valuable from the point of view, as it were, of the universe—is plainly a religious belief, even when it is held by people who do not believe in a personal deity. It is, in fact, the most fundamental purpose of traditional religions to make exactly that

236. C.S. LEWIS, *THE ABOLITION OF MAN* 29 (1947).

237. See *TRIBE*, *supra* note 233, at 828.

238. Some years ago, Larry Tribe argued for differing definitions of religion in Free Exercise cases versus Establishment Clause cases along these lines in his influential constitutional treatise. *Id.* at 827–28.

239. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 413 (1992).

240. *Id.*

claim to its faithful, and to embody it in some vision or narrative that makes the belief seem intelligible and persuasive.²⁴¹

Whether or not this God's-eye view of the universe is sensible without God—Hilary Putnam challenges it without surrendering at least a minimal moral realism²⁴²—is not the issue here. The conscientious vegan very likely considers animal life objectively valuable from the point of view of the universe, since it is at least questionable how one might rate an animal's life from its own point of view. Objective values require something akin to this kind of god-like perspective.

In linking religion and the objectivity of values as a criticism of legislation, Dworkin was making the mistake of mixing up Establishment and Free Exercise Clause issues. Government is constantly teaching the objective value of human life—in public schools, in government programs, in official announcements—without raising Establishment Clause concerns.²⁴³ Dworkin could not possibly have meant that this entire edifice of objective values claims is unconstitutional as an establishment of religion. But Dworkin was right about the meaning of religion for purposes of the Free Exercise Clause and related statutes protecting religious liberty.²⁴⁴ There, moral realism is the mark of religious commitment.

An additional ground for associating religion generally with the objectivity of values is the consistent support of moral relativism by critics of religion. At one time I would have said that the charge of moral relativism against atheists was a calumny. But it has since become clear to me that indeed this is the case. Leiter, for example, expressly rejects moral realism.²⁴⁵ And, as I have argued elsewhere, the New Atheists also generally reject moral realism or the

241. *Id.* at 413–14.

242. See HILARY PUTNAM, *REALISM WITH A HUMAN FACE* 37 (James Conant ed., 1992) (“And if a rebirth of a full-bodied, red-blooded metaphysical realism were the way to get people to accept the objectivity of ethics, then I would almost be willing to pay the price of letting that happen.”).

243. See *TRIBE*, *supra* note 233, at 829 (stating that public schools may require a moment of silence or meditation without violating the Establishment Clause); President Barack Obama, Statement by the President on the School Shooting in Newtown, Connecticut (Dec. 14, 2012), *available at* <http://www.whitehouse.gov/photos-and-video/video/2012/12/14/president-obama-makes-statement-shooting-newtown-connecticut#transcript> (discussing the value of human life).

244. See *supra* notes 239–41 and accompanying text.

245. See LEITER, *supra* note 2, at 163 n.12.

objectivity of values, though there is reason to doubt the consistency of their position.²⁴⁶

But the most candid assertion of the relationship between moral subjectivism and religious skepticism is set forth in S.T. Joshi's 2003 book, *God's Defenders: What They Believe and Why They Are Wrong*.²⁴⁷ Joshi's book is an aggressive and breezy attack on seven so-called defenders of God²⁴⁸ and would not be cited as authoritative except for the fact that the book was published by Prometheus Books, which tends to be a reliable barometer for characterizing the thinking of current religious skepticism in America.²⁴⁹

Joshi expressly states that while morals are "nothing more than preferences," they are still real, but only in the sense that they are "real preferences."²⁵⁰ He rejects C.S. Lewis's criticism of naturalism—for "naturalism" substitutes moral relativism or moral subjectivism—that if good and evil were really just illusions, the people who profess that position would not work so hard at improving the human race.²⁵¹ Joshi claims that he prefers that his preferences be adopted by others, even though his own preferences are not objectively "true."²⁵²

Joshi states the epistemological problem very succinctly. He writes that there are only two ways in which moral claims can be objectively right or wrong: either "there must be something built into the fabric of the universe that makes some moral values right and others wrong" or "a god or gods must dictate a code of morals to human beings."²⁵³ Since Joshi believes that the first option "is so obviously false that its mere utterance is sufficient to refute it,"²⁵⁴ the

246. See LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM, *supra* note 235, at 184 (discussing Richard Dawkins and the New Atheists).

247. JOSHI, *supra* note 230.

248. See *id.* at *passim* (labeling T.S. Eliot, William F. Buckley Jr., Jerry Fallwell, Annie Dillard, William James, G.K. Chesterton, and C.S. Lewis as God's defenders).

249. John W. Loftus, *Prometheus Books is the Premier Atheist Publisher in Our Generation*, DEBUNKING CHRISTIANITY (Dec. 31, 2009), <http://debunkingchristianity.blogspot.com/2009/12/prometheus-books-is-premier-atheist.html>. The reader can get a feel for the sides concerning Prometheus by looking at John Loftus's blog entry defending the publishing house as the "premier atheist publisher of our generation." *Id.*

250. JOSHI, *supra* note 230, at 115.

251. *Id.* at 114–15.

252. *Id.* at 115.

253. *Id.* at 269.

254. *Id.*

relationship between religion, and indeed theism, and moral realism is considered by him to be very close.²⁵⁵

But even if moral realism and religion are reasonably connected, and even if moral realism and categorical demands are connected, there is still the question of whether taking Leiter's first category as the basis for applying religious exemptions, as I am proposing here, is practical. Treating categorical demand as defining religion for purposes of religious exemptions from general laws may seem too broad for any court to actually apply. It suggests that the claimant's demand for exemption would always be determinative. Because of this problem, courts will inevitably end up applying something like an analogical approach to religious exemptions in which the beliefs of a claimant who is not a member of a traditional and organized religious group is compared to the beliefs of persons who are members of such groups.²⁵⁶ Kent Greenawalt has championed just such an approach,²⁵⁷ and, as I will argue in the next Part, that was the basic approach of the United States Supreme Court in the Vietnam War draft cases.²⁵⁸

The breadth, and therefore the impracticality, of using categorical demands as the ground of religious exemption *is* a practical problem, but it is not a theoretical one. In theory, and even in practice if only a judge could really get to know a particular claimant for a religious exemption, the genuine experience of a categorical demand would by itself be quite sufficient to justify a religious exemption. The willingness to suffer sanctions rather than violate one's beliefs, which is what Leiter means by a categorical demand, is precisely the kind of commitment that religious exemptions aim to protect.²⁵⁹ The practical problem is that exemptions exist and therefore we do not know who would be willing to suffer "for the sake of the name" as opposed to those who are claiming the exemption out of some lesser commitment. But if we could be sure of who is willing to suffer

255. See *id.* at 269–70, 278–79, 302.

256. See *United States v. Seeger*, 380 U.S. 163, 165–66, 173–74, 187 (1965). For a good example of the power of analogy in a slightly different religious context, see *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) stating, "[i]f the old definition [of religion] has been repudiated, however, the new definition remains not yet fully formed. It would appear to be properly described as a definition by analogy." *Id.*

257. See 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 139–41 (2006).

258. See *infra* notes 272–88, 319–25 and accompanying text.

259. See *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943); LEITER, *supra* note 2, at 34.

severe consequences rather than obey the state, we would know who should be granted a religious exemption.

It should also be noted that an empirical disagreement with the majority is not a ground of a categorical demand. A claimant for religious exemption who is asserting, in effect, “if matters were as you believe them to be, I would agree with you,” is not responding to a categorical demand in Leiter’s sense.

This is not a distinction that can be pushed very hard. The conscientious vegan may very well have what might be termed empirical disagreements with the majority. She may believe that animals possess a self-consciousness and sensitivity that the majority disputes as a matter of fact. But that kind of disagreement is not fully empirical. The starting point of the vegan and the vegan’s view of the burden of proof differ from that of the majority in ways that plainly reflect a value dispute rather than a purely empirical one.

What I mean by an empirical disagreement will become clear in Part VI of this article, in which I discuss exemptions from mandatory vaccination laws. In that context, a parent who judges vaccinations to be dangerous to his child is not going to permit a vaccination to be performed and is going to be willing to suffer severe sanction rather than do so. Yet, if that same parent agreed with the majority that the danger of vaccination is minimal, the parent might agree that the risk is worth running for the sake of everyone, including his own child. I do not consider such a disagreement, though passionately disputed by the parent, to represent Leiter’s categorical demand.

We are now in a position to evaluate preliminarily the differences between the Pro-Religion Equality Project and the Anti-Religion Equality Project, though the differences will become clearer in the rest of this article. At this point, we can see that the equality of value between conscientious commitment grounded in traditional organized religion and other forms of conscientious commitment that is so important to Leiter is retained in the Pro-Religion Equality Project. But the treatment of this equality as representing a religious continuum changes Leiter’s context. Specifically, the Pro-Religion Equality Project, because it utilizes the terminology of religion, is firmly grounded in the constitutional and statutory religion texts that

already exist to protect liberty,²⁶⁰ which is not the case with regard to conscience exemptions generally.²⁶¹

In addition, the commitment to moral realism provides a ground—one which is not available to Leiter since he rejects moral realism²⁶²—upon which one can support robust protection of religious exemptions from generally applicable laws even when those exemptions impose some burdens on others. The ground for that protection is the possible truth of the religious claim, not just the effect of violating conscience on the claimant herself. The existence of religious exemptions can now reflect the judgment by the majority that the majority may be wrong in its demands. Leiter acknowledges this epistemological possibility, but since he views religion as he understands it to be insulated from reason and evidence,²⁶³ he denigrates the likelihood of much insight into knowledge from religious conscience.

Another advantage of the Pro-Religion Equality Project is that it entirely sidesteps the issue of supernaturalism. Religion is more than supernaturalism. Religion is more than the belief in a supreme being independent of the material universe. Definitions of religion that begin with supernaturalism in order to apply, or not apply, religious exemptions are much too narrow to be of any use as principled justification.²⁶⁴

Finally, the greatest advantage of the Pro-Religion Equality Project is that it is not really new. As we shall see in the next Part, this approach is close to that of the Supreme Court in the Vietnam War draft cases. And I would like to think that its broad and liberal approach to religion is instinctively the default position of most Americans concerning the meaning of religion.

260. These authoritative texts, such as the First Amendment and the Religious Freedom Restoration Act, of course, refer to religion rather than conscience. See Tebbe, *supra* note 225, at 1114 (“[R]eligious freedom laws typically reference religion alone.”).

261. See *id.* (“Virtually everywhere that American law protects free exercise and non-establishment it focuses on religion.”).

262. LEITER, *supra* note 2, at 101 n.12.

263. *Id.* at 33–35.

264. Nelson Tebbe, for example, in studying nonbelievers describes the subject of study as follows in a section entitled *Who Are Nonbelievers?*: “When I refer to nonbelievers here, I mean to include people who take negative or skeptical positions on the existence of superhuman beings and supernatural powers.” Tebbe, *supra* note 225, at 1117. But Tebbe states that this is not a definition. *Id.* at 1117 n.21. There are many definitions of religion, only some of which begin with the supernatural or the superhuman. *Id.* at 1134 & n.102.

VI. THE VIETNAM DRAFT CASES

There is a good reason why Professor Paulsen referred to, and criticized, the Vietnam War draft cases in his argument for a narrowly defined religious foundation for religious liberty.²⁶⁵ For in those cases, *United States v. Seeger*,²⁶⁶ *Welsh v. United States*,²⁶⁷ and *Gillette v. United States*,²⁶⁸ the Supreme Court set forth a very inclusive understanding of the meaning and scope of religious belief.²⁶⁹ It is this inclusive vision that some traditional religious believers object to as a threat to the protection of genuine religious liberty.²⁷⁰

Seeger is probably the most thorough exploration of theology that the Supreme Court has ever undertaken. The context of the case concerned three claimants of conscientious objector status during the Vietnam draft era: Daniel Seeger, Arno Jakobson, and Forest Peter.²⁷¹ Congress had broadened the draft exemption statute to include persons who “by reason of [their] religious training and belief, [are] conscientiously opposed to participation in war in any form.”²⁷² Religious training and belief were defined in the Act as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code.”²⁷³ While the three claimants challenged the constitutionality of this definition as excluding the nonbeliever and some religious believers, Peter and Jakobson also

265. See Paulsen, *supra* note 159, at 1196.

266. 380 U.S. 163 (1965).

267. 398 U.S. 333 (1970).

268. 401 U.S. 437 (1971).

269. See *id.* at 450–51 (stating that, when raising an objection to military service on the grounds of “religious training and belief,” there is no requirement of a “particular sectarian affiliation or theological position”); *Welsh*, 398 U.S. at 340 (finding that petitioner was entitled to a conscientious exemption under the Universal Military Training and Service Act because petitioner’s beliefs, albeit unorthodox, “function[ed] as a religion in his life”); *Seeger*, 380 U.S. at 176, 183–84 (constructing the term “religious training and belief” in the Universal Military Training and Service Act, to include beliefs that are not traditional beliefs in God).

270. See *Seeger*, 380 U.S. at 165–66 (holding that a person may be exempted under the Universal Military Training and Service Act by having a belief “that is sincere and meaningful” which “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”); Paulsen, *supra* note 159, at 1203.

271. *Seeger*, 380 U.S. at 164–69.

272. Universal Military Training and Service Act, 50 U.S.C. app. § 456(j) (1958).

273. *Id.*; *Seeger*, 380 U.S. at 165.

claimed that their beliefs met the statutory definition.²⁷⁴ The Court held in a unanimous opinion by Justice Clark, one later repudiated by Justice Harlan,²⁷⁵ that all three claimants met the statutory definition, thus avoiding any constitutional issue.²⁷⁶

Justice Clark first held that Congress had not intended to distinguish between theistic and nontheistic religious beliefs: by using the term Supreme Being rather than God, Congress had intended “to embrace all religions.”²⁷⁷ And Congress had, further, not restricted the scope of religion that could ground a legitimate application for conscientious objector status.²⁷⁸ The proper test of religion for purposes of the statute “is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”²⁷⁹

As became clear later in the opinion, the reason the Justices felt they could not distinguish between traditional theism and non-theism was the broad interpretation that modern theology applies to the meaning of God.²⁸⁰ Justice Clark concluded that God does not just mean the orthodox God, but “the broader concept of a power or being, or a faith, ‘to which all else is subordinate or upon which all else is ultimately dependent.’”²⁸¹ And the reason that religion tends to be defined so generously is that, for Justice Clark, religion is that realm of experience “dealing with the fundamental questions of man’s predicament in life.”²⁸²

The opinion’s broad approach to defining religious belief for purposes of conscientious objector status was said to “embrace[] the ever-broadening understanding of the modern religious community.”²⁸³ Justice Clark quoted the theologian Paul Tillich, Bishop John Robinson, Vatican II, and, perhaps most revealingly for a broad definition of religion, David Muzzey, “a leader in the Ethical Culture Movement.”²⁸⁴ For Muzzey, “[e]verybody except the [comparatively few] avowed atheists . . . believes in some kind of

274. *Seeger*, 380 U.S. at 165.

275. *Welsh v. United States*, 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

276. See Matthew G. Lindenbaum, *Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: Seeger, Welsh, Gillette, and § 6(j) Revisited*, 36 COLUM. J.L. & SOC. PROBS. 237, 242–43 (2003).

277. *Seeger*, 380 U.S. at 165.

278. *Id.* at 176.

279. *Id.* at 165–66.

280. See *id.* at 180–83.

281. *Id.* at 174 (citation omitted) (internal quotation marks omitted).

282. *Id.*

283. *Id.* at 180.

284. *Id.* at 180–82.

God”²⁸⁵ Justice Clark had previously noted in the opinion that “[n]o party claims to be an atheist or attacks the statute on this ground.”²⁸⁶ In a similar tone, the opinion quoted Tillich as referring to the God above the God of theism, “the seriousness of that doubt in which meaning within meaninglessness is affirmed”²⁸⁷

What can we learn about the nature of religion from the Tillich quotation about “meaning within meaninglessness?”²⁸⁸ The challenge for the Western nonbeliever is that without the personal, supernatural, creator God of the Bible—what Justice Clark presumably meant by the “orthodox belief in God”²⁸⁹ and what Justice Scalia would later denominate “the God of monotheism” in the *McCreary County Ten Commandments* case²⁹⁰—the nonbeliever struggles to justify the belief that anything whatever is of real value. If everything is a cosmic accident, without plan or guiding intelligence and purpose, then is not everything meaningless? To put this another way, the nonbeliever can obviously be good without God, as the humanist chaplain Greg Epstein argues,²⁹¹ but can a nonbeliever be good without objective good?

What Tillich is suggesting, and apparently the Court agreed with him, is that the faith that there is meaning in existence is one way of describing belief in God itself.²⁹² Many people who count themselves as nonbelievers could legitimately be considered religious, and indeed could even be considered believers in God, for purposes of the statute and for other purposes as well. The marker of religious belief thus becomes a commitment to sincere and serious, in the sense of demanding, moral realism, just as suggested in this article.

Justice Douglas’s concurrence in *Seeger* pointed to Hinduism and Buddhism to illustrate the breadth of the concept of a Supreme Being.²⁹³ He concluded that the words Supreme Being should be construed to “include the cosmos, as well as an anthropomorphic entity.”²⁹⁴ To attribute to Congress a narrow, parochial view of the

285. *Id.* at 182 (quoting DAVID S. MUZZEY, *ETHICS AS A RELIGION* 86–87 (1st ed. 1951)).

286. *Id.* at 173.

287. *Id.* at 180 (quoting 2 PAUL TILlich, *SYSTEMATIC THEOLOGY: EXISTENCE AND THE CHRIST* 12 (1957)).

288. *Id.*

289. *Id.* at 166.

290. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893 n.3 (2005) (Scalia, J., dissenting).

291. GREG M. EPSTEIN, *GOOD WITHOUT GOD: WHAT A BILLION NONRELIGIOUS PEOPLE DO BELIEVE*, at x (2009).

292. *See Seeger*, 380 U.S. at 180, 184, 186–88.

293. *Id.* at 189 (Douglas J., concurring).

294. *Id.* at 188.

term Supreme Being would create constitutional difficulties because Congress would be favoring one religious faith over another.²⁹⁵ Douglas noted, as did the majority opinion, that none of the claimants “comes to us an avowedly irreligious person or as an atheist.”²⁹⁶

Since there is no longer a draft, we do not have to be concerned with the legitimate question of whether the Court was playing fast and loose with the statute in *Seeger*.²⁹⁷ At one point in the opinion, Justice Clark even appears to misstate the wording of Section 6(j).²⁹⁸ The point for our purposes is not whether the statute was fairly interpreted, but what it means to be religious. Christopher Hitchens is a good example of someone who believed passionately that human life was meaningful despite not believing in God;²⁹⁹ Sam Harris, another of the New Atheists, in his recent book about the reality of good and evil, *The Moral Landscape*, is another.³⁰⁰ Such persons can be viewed as religious from the point of view of the definition in *Seeger* because they affirm meaning within meaninglessness.

Of course, *Seeger* was not the last word in the line of draft cases.³⁰¹ Congress amended the statute two years after the *Seeger* opinion to remove reference to the words “Supreme Being” as defining the meaning of religious training and belief.³⁰² As Louis Fisher put it, “what the Court in effect deleted, Congress deleted in fact.”³⁰³ This

295. *See id.*

296. *Id.* at 193.

297. *See* Major William D. Palmer, *Time to Exorcise Another Ghost From the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179, 200–01 (1993); R. Norman Moody, *After 40 Years, Return of Military Draft Not in Sight*, FL. TODAY, July 23, 2013, <http://www.floridatoday.com/article/20130723/NEWS01/307230013/1006/rss01/After-40-years-return-military-draft-not-sight>.

298. *See* Palmer, *supra* note 297, at 200 (“Early in the opinion, Justice Clark gave an indication of the care with which he intended to treat the words and intent of Congress when he substituted the word ‘economic’ for ‘philosophical’ in the statute’s list of beliefs that would not qualify for the exemption.”).

299. *See generally* HITCHENS, *supra* note 132 (arguing that religion is man-made and that human decency is not derived from religion).

300. *See* SAM HARRIS, *THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES* 2 (2010); Simon Hooper, *The Rise of the ‘New Atheists’*, CNN (Nov. 9, 2006 10:06 AM), <http://www.cnn.com/2006/WORLD/europe/11/08/atheism.feature/index.html>.

301. *See Welsh v. United States*, 398 U.S. 333, 335–36 (1970).

302. *See Seeger*, 380 U.S. at 165 (majority opinion); *compare* Military Selective Service Act, Pub. L. No. 90-40, § 7, 81 Stat. 100, 104 (1967) (omitting “Supreme Being” from the Act), *with* Military Selective Service Act, 50 U.S.C. app. § 456(j) (1958) (including “Supreme Being” in the Act).

303. Louis Fisher, *Nonjudicial Safeguards for Religious Liberty*, 70 U. CIN. L. REV. 31, 58 (2001).

change did not figure directly in the Court's next case, *Welsh*, but on the other hand, the statutory change must have been viewed by some of the Justices as supportive of the general approach in *Seeger*, an approach upon which the *Welsh* plurality relied to an overwhelming degree.³⁰⁴

In *Welsh*, there was no majority to reaffirm the *Seeger* language.³⁰⁵ Only three other Justices—Douglas, Brennan, and Marshall—joined Justice Black's plurality opinion.³⁰⁶ Justice Harlan concurred in the result, expressly repudiating his vote in *Seeger*,³⁰⁷ and three Justices dissented: Justice White joined by Justice Stewart and Chief Justice Burger.³⁰⁸ The decision to dissent by Justices White and Stewart, along with the concurrence by Justice Harlan, indicated that three of the original votes in *Seeger* either now disagreed with that approach or were at least unwilling to reaffirm it.³⁰⁹

For Justice Black, *Welsh* essentially was *Seeger*, so no expansion of the approach taken in *Seeger* was necessary to reverse *Welsh*'s conviction for refusing to be inducted:

The controlling facts in this case are strikingly similar to those in *Seeger*. Both *Seeger* and *Welsh* were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither *Seeger* nor *Welsh* continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application to their local draft

304. See *Welsh*, 398 U.S. at 343; *Seeger*, 380 U.S. at 185–86.

305. See *Welsh*, 398 U.S. at 335, 344 (5-3 decision) (Harlan, J., concurring).

306. See *id.* at 335.

307. See *id.* at 344–45.

308. See *id.* at 367 (White, J., dissenting).

309. Justice White's dissent indicated scant support for *Seeger*: "Whether or not *United States v. Seeger* . . . accurately reflected the intent of Congress in providing draft exemptions for religious conscientious objectors to war, I cannot join today's construction of s 6(j)" *Id.* at 367 (citation omitted).

boards for conscientious objector exemptions from military service under s 6(j) of the Universal Military Training and Service Act. . . .

In filling out their exemption applications both Seeger and Welsh were unable to sign the statement that, as printed in the Selective Service form, stated 'I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form.' Seeger could sign only after striking the words 'training and' and putting quotation marks around the word 'religious.' Welsh could sign only after striking the words, 'my religious training and.' On those same applications, neither could definitely affirm nor deny that he believed in a 'Supreme Being,' both stating that they preferred to leave the question open. But both Seeger and Welsh affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a 'still, small voice of conscience'; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh.³¹⁰

Justice Black rejected the attempt by the government to distinguish Welsh from Seeger on the grounds first, that Welsh was more insistent than Seeger that his views were not religious and second, that Welsh's views were essentially political, sociological, or philosophical or constituted a merely personal moral code, which the statute expressly forbade as a basis for exemption.³¹¹ As to the first ground, Justice Black reasoned that an applicant for exemption might not be familiar with "the broad scope of the word 'religious' as used in s 6(j)," and in any event, Welsh had written a letter to the Appeal

310. *Id.* at 335-37 (majority opinion).

311. *See id.* at 341-43.

Board stating that “his beliefs were ‘certainly religious in the ethical sense of the word.’”³¹² As to the second ground, Justice Black admitted that these factors did influence Welsh, as they had Seeger, but the exclusion applied only to applicants for exemption whose views do not rest “at all upon moral, ethical, or religious principle but instead rest solely upon considerations of policy, pragmatism, or expediency.”³¹³

As the above quote suggests, Justice Black’s approach did in fact broaden the formula in *Seeger* by its emphasis on the moral and ethical as grounds of religious belief. The test of exemption for Justice Black in *Welsh* was stated as follows:

What is necessary under *Seeger* for a registrant’s conscientious objection to all war to be ‘religious’ within the meaning of s 6(j) is that this opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.³¹⁴

As shown above, the actual *Seeger* test did not mention the moral or ethical as permitted sources for religious views independent of religion itself.³¹⁵ The test applied in *Seeger* used the word “belief” without indicating any source.³¹⁶ By using the words moral and ethical, in addition to the word religious, to describe the kind of belief that could ground the exemption, Justice Black was theoretically permitting claimants to deny that they were religious and to claim that their pacifism was rooted in morality and ethics, not religion.³¹⁷

However, this expansion of the test for religion was not the reason Justice Harlan rejected the statutory test in *Seeger* that he had earlier supported.³¹⁸ While Justice Harlan did note that the plurality now allowed “beliefs that are purely ethical or moral in source” to qualify for the exemption, and that this approach eliminated the statutory requirement of a religious content for the exemption,³¹⁹ he stated, in

312. *Id.* at 341.

313. *Id.* at 342–43.

314. *Id.* at 339–40.

315. *See id.* at 339 (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

316. *Id.* (quoting *Seeger*, 380 U.S. at 176).

317. *See id.* at 339–40.

318. *See id.* at 344–54 (Harlan, J., concurring).

319. *Id.* at 345.

obvious criticism, that the Court in *Seeger* had earlier “embrac[ed] a secular definition of religion” that conflicted with Congress’ language and intent.³²⁰

Why, then, did Justice Harlan concur in the reversal of *Welsh*’s conviction? Justice Harlan was of the view that Congress had made two distinctions, both of which violated the Constitution. First, Congress recognized only conscientious objection grounded on religion, as opposed to “secular beliefs.”³²¹ That choice violated the Establishment Clause.³²² Second, Congress distinguished between theistic and nontheistic religion, which also violated the Establishment Clause.³²³

What was the difference for Justice Harlan between religious beliefs and the “inner ethical voice that bespeaks secular and not ‘religious’ reflection”³²⁴ that Congress had unconstitutionally excluded from the statutory exemption? Justice Harlan never clearly distinguished the secular from the religious, but he did note that, to be constitutional, the statute must include exemption for beliefs that “emanate from a purely moral, ethical or philosophical source” (which the statute expressly excluded) and must be religiously neutral in the sense that it includes “conscience” as a basis for its application.³²⁵

Justice Harlan’s views on the meaning of religion are nuanced. He did distinguish religious reasons from secular reasons and was of the view that to benefit the former and not the latter would violate the Establishment Clause as not religiously neutral.³²⁶ On the other hand, he was willing to live with the expansion of the term religious in the *Welsh* plurality to include both religious and secular grounds for pacifism even though this definition still excluded some people opposed to all war—those opposed to war on grounds of pragmatism.³²⁷ That exclusion from conscientious objector status did not violate the Establishment Clause for Justice Harlan.³²⁸

320. *Id.* at 353.

321. *Id.* at 356.

322. *See id.* at 356–57.

323. *See id.*

324. *Id.* at 357.

325. *Id.* at 358 & n.9.

326. *See id.* at 356 (explaining that were Congress to “draw the line between theistic and nontheistic religious beliefs on the one hand and secular beliefs on the other,” such distinctions would not be compatible with the Establishment Clause).

327. *Id.* at 359 n.10.

328. *Id.*

Justice White's dissent took issue with the plurality on grounds similar to those of Justice Harlan—that the plurality had not followed the text and intention behind the statutory exemption.³²⁹ The dissent took issue with Justice Harlan, however, concerning whether exempting only religious grounds for objection to war violates the Establishment Clause and whether, even if it did, this infirmity should result in extending the statutory exemption to a nonreligious objector such as Welsh.

The third case of what are usually considered the Vietnam draft trilogy is *Gillette*, which raised the issue of conscientious objection to a particular war—in this case the Vietnam War.³³⁰ The claimants in *Gillette* were Guy Gillette, whose views were “based on a humanist approach to religion,” and who was convicted for failure to report for induction, and Louis Negre, “a devout Catholic,” who was relying on a “just” war theory and who sought habeas corpus for discharge after induction and orders to report to Vietnam.³³¹ Justice Marshall noted that, in both instances, there was no doubt about the sincerity or religious character of the claimants' objections to the Vietnam War.³³²

Justice Marshall's majority opinion first rejected arguments that the statutory exemption reaches conscientious objector to a particular war.³³³ Not surprisingly, given the text, the Court ruled that it did not.³³⁴

The more significant argument was that the statute, construed as applying only to the conscientious objection to all wars, violates “the religious clauses of the First Amendment.”³³⁵ Justice Marshall interpreted the challenge as primarily an Establishment Clause issue that Congress was “impermissibly discriminat[ing] among types of religious belief and affiliation.”³³⁶

Justice Marshall admitted that insofar as the claimants' beliefs in *Gillette* were religious, the nature of their religious beliefs was the

329. See *id.* at 367 (White, J., dissenting) (“I cannot join today's construction of § 6(j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology.”).

330. *Gillette v. United States*, 401 U.S. 437, 439 (1971).

331. *Id.* at 439–41 (internal quotation marks omitted).

332. *Id.* at 440.

333. See *id.* at 447.

334. See *id.*

335. *Id.* at 448.

336. *Id.* at 449.

reason their claims failed while other, different religious beliefs qualified for conscientious objector status.³³⁷ But the statutory restriction of conscientious objector status to objection to all war rather than particular wars is religiously neutral, as required by the Establishment Clause. There was no violation because the distinction Congress used—selective objection versus objection to war in any form—does not itself distinguish among religious beliefs.³³⁸ The distinction pointed to by the claimants is a “de facto discrimination” because some religions permit participation in just wars only.³³⁹ While that does not automatically undermine the constitutional challenge, the existence of valid secular purposes for the Congressional policy recognizing conscientious objector status for objectors to all wars and for limiting that exemption to just that orientation are sufficient to uphold the statute against such a de facto challenge.³⁴⁰ The main justification for the limit is the interest in fairness and the danger of erratic or discriminatory decisions if opposition to particular wars were permitted to ground the conscientious objector classification.³⁴¹ The objection to particular wars is ultimately subjective.³⁴²

The claimants also raised a Free Exercise claim that “conscripting persons who oppose a particular war on grounds of conscience and religion” violates the Constitution.³⁴³ Here Justice Marshall found the government’s interest outweighed the religious interest at issue:

The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners’ position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government’s interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, s 8.³⁴⁴

337. *See id.* at 449–50.

338. *See id.* at 450–51.

339. *Id.* at 451–52.

340. *See id.* at 452–53.

341. *See id.* at 455.

342. *See id.* at 456.

343. *Id.* at 461.

344. *Id.* at 462.

The Justices in *Gillette* were not unanimous.³⁴⁵ Justice Black concurred in the judgment and joined only Part I of the opinion—the rejection of the statutory claim.³⁴⁶ Justice Douglas dissented, but agreed with the Court that selective objection does not meet the statutory definition of conscientious objection.³⁴⁷

In terms of the understanding of what it means to be religious, *Gillette* is mixed. Though the issue was not before the Court, neither the majority opinion nor any other opinion in the case questioned whether *Gillette*’s “humanist approach to religion” qualified as religious for purposes of the statutory exemption. Both *Gillette* and *Negre* (who was raising religious claims specifically under his Catholic religious training) were permitted to question whether the statute could be interpreted to reach their claims of objection to particular wars.³⁴⁸

On the other hand, in discussing the Free Exercise challenge to the statute, the majority only made the “assumption” that *Gillette*’s and *Negre*’s “beliefs concerning war have roots that are ‘religious’ in nature within the meaning of the Amendment as well as this Court’s decisions construing s 6(j)” rather than holding that they did.³⁴⁹ This reservation, if that is what it was, would have been aimed at *Gillette* rather than *Negre*, since obviously Roman Catholic teachings are religious by any definition.

In addition, Justice Douglas, in dissenting from the Free Exercise holding, distinguished carefully between *Negre* and *Gillette*.³⁵⁰ Justice Douglas would have upheld both their claims of conscientious objection to particular wars.³⁵¹ But Justice Douglas’ conclusion with regard to *Negre* was straightforward: “*Negre* is opposed under his religious training and beliefs to participation in any form in the war in Vietnam.”³⁵² In contrast, for the humanist *Gillette*, the route to the same conclusion was more contorted:

It is true that the First Amendment speaks of the free exercise of religion, not of the free exercise of

345. *See id.* at 463, 470 (8-1 decision).

346. *See id.* at 441, 447, 463.

347. *See id.* at 463 (Douglas, J., dissenting).

348. *See id.* at 439–41 (majority opinion).

349. *Id.* at 449.

350. *See id.* at 463–75 (Douglas, J. dissenting).

351. *Id.* at 463, 470, 475.

352. *Id.* at 475.

conscience or belief. Yet conscience and belief are the main ingredients of First Amendment rights. They are the bedrock of free speech as well as religion. The implied First Amendment right of "conscience" is certainly as high as the "right of association". . .

Conscience is often the echo of religious faith. But, as this case illustrates, it may also be the product of travail, meditation, or sudden revelation related to a moral apprehension of the dimensions of a problem, not to a religion in the ordinary sense.³⁵³ So, Justice Douglas perhaps did not regard the definition of religion to be as broad as did the majority opinion in *Seeger* that he had joined. Something in Gillette's beliefs called forth from him a distinction between religion and conscience that those of *Seeger* did not.

Before concluding this section concerning the approach of the Supreme Court, I need to address the claim sometimes put forth that the Justices narrowed their understanding of religion from the breadth exhibited in *Seeger* in *Wisconsin v. Yoder* in 1972.³⁵⁴ In *Yoder* members of the Amish faith were convicted under Wisconsin's compulsory school attendance statute for refusing to send their children to school beyond the eighth grade.³⁵⁵ They challenged their convictions on the ground that their free exercise rights were violated.³⁵⁶ Chief Justice Burger, writing for the majority, did not specify a definition of religion, but stated "[t]hat the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."³⁵⁷ Justice Burger examined the belief of the Amish that salvation requires living separate and apart from the influences of the modern world, based on a literal reading of the Apostle Paul's command, "be not conformed to this world . . ."³⁵⁸ The *Yoder* majority opinion did not mention the *Seeger/Welsh* definition of religion.³⁵⁹ In his dissent, Justice Douglas suggested that the majority opinion was contrary to *Seeger/Welsh*,³⁶⁰ which is undoubtedly why *Yoder* is sometimes read that way.

353. *Id.* at 465-66.

354. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

355. *Id.* at 207-08.

356. *See id.* at 208-09.

357. *Id.* at 216.

358. *Id.* at 210, 216.

359. Though Justice Harlan's opinion in *Welsh* was cited in *Yoder*. *Id.* at 215 n.6.

360. *Id.* at 247-48 (Douglas, J., dissenting).

But the dispute between Justice Douglas and Justice Burger is by no means clear. Here is the actual quote by Justice Burger and Justice Douglas' response:

[W]e must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.³⁶¹

Now, the first question we might ask is whether Thoreau would disagree with Justice Burger. Thoreau was no fan of what we ordinarily call conscience, though he might have agreed that his choices were personal and philosophical and not religious.³⁶²

361. *Id.* at 215–16 (majority opinion) (footnote omitted).

362. Here is an excerpt from the poem *Atlantides*:

Conscience is instinct bred in the house,
Feeling and Thinking propagate the sin
By an unnatural breeding in and in.
I say, Turn it out doors,
Into the moors.

In response to Justice Burger, Justice Douglas quoted from the *Seeger* opinion—pointing to the “place parallel to that filled by the God of those admittedly qualifying for the exemption” language to try to show that Justice Burger had improperly narrowed the definition of religion.³⁶³ Suffice it to say that this exchange did not settle anything. Justice Burger did not repudiate the *Seeger* opinion’s language and the application of that language to Thoreau presents a nice question that tossed off dicta on either side could not resolve.

The place we end up from this short examination of case law is not another attempt to define religion as such. Rather it is this: the Court in this series of cases allows for a distinction between the secular and the religious, particularly as the religious serves as a ground for fundamental opposition to the policies of the state. Insofar as that opposition rests on a personal judgment weighing policy values differently from the balance set by the majority, there is nothing religious; there is merely the stuff of winning and losing in politics itself.

But insofar as that opposition rests on a different level of personal identity that the person experiences as compulsive rather than chosen, whether that compulsion is experienced from the outside or the inside, the objector may be said to stand in religious opposition to the state. That compulsion is grounded in the objective reality of meaning, which is why religion is never a matter of choice. As Douglas Laycock puts it:

[t]he nontheist’s belief in transcendent moral obligations—in obligations that transcend his self-interest and his personal preferences and which he experiences as so strong that he has no choice but to comply—is analogous to the transcendent moral obligations that are part of the cluster of theistic beliefs that we recognize as religious.³⁶⁴

My only hesitance regarding Laycock’s statement is that calling this a nontheistic belief may confuse the issue. The belief in transcendent obligations reaches all the way to many persons conventionally thought of, and often self-described as, nonbelievers. They are to be considered religious as well.

363. *Wisconsin*, 406 U.S. at 248 (Douglas, J., dissenting) (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

364. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 336 (1996).

In none of these cases is there a requirement of belief in a personal God or a supernatural realm before one can be considered religious. In none of these cases is there a requirement of a body of fellow practitioners or a regimen of ceremonial customs. Nor is there a requirement of texts. What there is, is the sense that one's identity is at risk and at stake in the felt obligation at issue. Not every religion functions as commandment. But every religious belief makes demands.

The Pro-Religion Equality Project provides an overall understanding of the relationship between conscience claims by traditional religious believers and conscience claims by persons who are not a part of traditional religion. The Vietnam Draft cases manifest that understanding, or something like it, and set forth a framework for applying that understanding in the context of broadly interpreted religious exemption provisions. Before discussing objections to that framework in Part VII, it is necessary to consider briefly the alternative to broadly interpreted religious exemption provisions: conscience clauses that also provide for exemptions from generally applicable laws.

VII. THE LIMITATIONS OF CONSCIENCE CLAUSES

The fundamental objection to the Vietnam draft cases, on both sides, is that the cases defined religion too broadly. From the nonbeliever side, the harm of such a definition, aside from the fact that it is in some sense false, is that it includes nonbelievers in a realm that they may sincerely reject.³⁶⁵ *We* are not religious, nonbelievers might say.

From the believer side, the broad understanding of religion may not only be false to their understanding of their own position and of reality, but may devalue the stakes involved in considering religion and religious exemptions from the commands of the state.³⁶⁶ Broad definitions of religion inevitably dilute religious liberty claims by allowing other kinds of claims to be raised.³⁶⁷ *They* are not religious, believers might say.

In principle, each side might simply reject recognition of the need for any exemptions from the commands of the state. For the

365. See *supra* notes 129–51 and accompanying text.

366. See Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of Religion?*, 39 HASTINGS CONST. L.Q. 357, 372–73 (2011) (describing the fear that a broad definition of religion could lead to insincere requests for exemptions).

367. *Id.*

nonbeliever, the state's command might be morally wrong, but the answer to that would be some form of struggle against it. For the believer, the state's command might controvert religious truth, but the answer would be martyrdom. These responses are not entirely different from each other.

In practice, however, that has not been the position of believers or nonbelievers. Historically, nonbelievers have been willing to recognize religious exemptions to some extent, which is why Congress passed the RFRA practically unanimously.³⁶⁸ Recently, however, as described above, nonbelievers have been arguing that religious exemptions per se are unjustified and discriminatory.³⁶⁹ Conscience exemptions, available to all, should be substituted. Donald Beschle takes this position, for example.³⁷⁰ Leiter takes this position, but then really argues against all exemptions from generally applicable law.³⁷¹

Believers have also historically favored religious exemptions.³⁷² In response to the challenge by nonbelievers to religious exemptions, some believers have argued that religious claims to exemption are different from those of secular conscience.³⁷³ Professor Paulsen takes that position, for example.³⁷⁴ That does not necessarily mean that such believers oppose conscience clauses, only that they want religious exemptions to be treated separately. Of course, such believers may suspect that even differentiated conscience clauses would inevitably dilute claims of strictly religious liberty.

What I hope to show in this Part is that, contra to some nonbelievers, conscience clauses should not be added to religious exemptions or substituted for them, and therefore the claims of nonbelievers for exemption should be included within religious liberty claims, as occurred in the draft cases above. The objections of believers to that proposal will be taken up in the next Part.

Let me illustrate the problem of robust conscience clauses, by which I mean conscience clauses that will actually exempt some

368. See Ledewitz, *Experimenting with Religious Liberty*, *supra* note 113, (describing adoption of the RFRA).

369. See *supra* notes 145–51 and accompanying text.

370. See Beschle, *supra* note 366, at 390.

371. See LEITER, *supra* note 2, at 93–104.

372. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 210–11 (1972) (seeking a religious exemption from having to comply with a compulsory school attendance statute as the law is contrary to Amish values).

373. See Paulsen, *supra* note 159, at 1203–04 (explaining that religious obligations are different from moral belief systems that have no concept of God).

374. *Id.*

claimants despite the burden this may sometimes place on others and despite the harms that exemptions may create, by contrasting the Air Force yarmulke case, *Goldman v. Weinberger*³⁷⁵ with conscience exemptions from mandatory child vaccination laws. I am not claiming to have exhausted all the different ways that either religious exemptions or conscience clauses can be conceptualized or can operate. What follows is a brief attempt to set forth one kind of contrast—that is, one way that religious exemptions can be contrasted with conscience clauses.

In *Goldman*, an Air Force regulation mandating uniform dress for Air Force personnel was applied to a rabbi, thereby preventing him from wearing a yarmulke, a religious requirement for Orthodox Jews under certain circumstances.³⁷⁶ The Air Force was enforcing a “strong interest in discipline,” rather than any form of religious discrimination,³⁷⁷ and there was no question of the sincerity of Goldman’s religious practice. In a situation like this, the government’s interest is entirely valid, but the weight of that interest falls vastly disproportionately on religious minorities whose interests in this context the majority is unlikely to value fairly.³⁷⁸ In other words, religious liberty functions here similarly to the way that Equal Protection law and other anti-discrimination principles function for other types of minorities.³⁷⁹

Importantly, *Goldman* was not implicitly criticizing the government’s interest or its practice of uniformity regarding everyone else. He was not attempting to reweigh a policy result. While the Court rejected Goldman’s claim, the reason stated was the unusual necessity of not forcing the military to make exceptions to its uniform discipline policy, not necessarily rejecting this kind of claim in all future contexts.³⁸⁰

Much of the Free Exercise case law can be viewed in similar fashion: not wishing to work on a day that is not the Sabbath for most people or the use of a forbidden substance for ceremonial purposes and so forth. The interest of the individual in maintaining the

375. 475 U.S. 503, 504 (1986).

376. *Id.* at 504–05.

377. *Id.* at 504. Actually, reading between the lines, there seemed to be evidence that enforcement of the Air Force regulation amounted to illegal retaliation, a point that did not escape Justice Stevens’ concurrence. *Id.* at 511 (Stevens, J., concurring).

378. *See id.* at 523–24 (Brennan, J. dissenting).

379. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764–65 (2011) (comparing equal protection and free exercise jurisprudence).

380. *See Goldman*, 475 U.S. at 509–10 (majority opinion).

religious practice is very great compared to the government's interest in uniform enforcement of an otherwise valid policy and is of a different nature than is the government's interest in universal enforcement.³⁸¹ There is harm from granting an exemption, but that harm can sometimes be outweighed by the interest of the claimant.³⁸²

Now, in contrast, consider the various forms of exemptions from mandatory child vaccination laws. Three types of exemptions to mandatory vaccination laws are typical: medical and religious, which are practically universal among the states, and philosophical, which are less common.³⁸³

Virtually all states . . . grant religious exemptions for persons who have sincere religious beliefs in opposition to immunization. Some statutes require parents to disclose their religion, while others are more liberally worded. A minority of states also grant exemptions for parents that profess philosophical convictions in opposition to immunization. These statutes allow parents to object to vaccination because of their "personal," "moral," or "other" beliefs.³⁸⁴

According to Nancy Berlinger of the Hastings Center, these exemptions operate as follows: medical exemptions apply to children with medical conditions that weaken their immune systems, "making routine immunizations risky"; religious exemptions apply to religious practices such as a belief in "faith healing"; but the nonmedical, nonreligious exemption claims tend to be by parents who:

have strong personal beliefs about the dangers of vaccines; in particular, the belief that certain childhood vaccines are linked to rising rates of autism. This claim has been the subject of several studies by the Institute of Medicine, which concluded that there is no scientifically credible evidence to support it. But two recent cases involving children with mitochondrial disorders who became seriously ill following vaccination—one child became autistic and

381. See *id.* at 523–24 (Brennan, J. dissenting).

382. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (holding that the Amish interest in religious practices outweighs the state's interest in compulsory education).

383. See James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 873–74 (2002).

384. *Id.* at 874.

the other died—have reinforced fears about immunization.³⁸⁵

Parents who fear immunization for safety reasons are usually reweighing a policy decision that the majority, through expert evidence, have decided differently.³⁸⁶ The majority have decided that immunization either does not cause harm or causes harm so infrequently that the public health benefits of universal immunization outweigh the risk. The minority that disagree with this judgment have no special interest that the majority are likely to ignore. Many of the voters who support universal immunization have children of their own and are exceedingly unlikely to downplay the threat of immunization to their own children.

The vaccination context, therefore, reflects an unusual political situation in which the losers in a purely political struggle concerning ordinary evaluations of consequences are permitted to opt out of the requirements of a law. As strongly as some parents may feel about vaccinations, this disagreement does not rise to the level of conscience, as that term is usually understood—“a sincere conviction about what is morally required or forbidden.”³⁸⁷ Granting parents a conscience exemption under these circumstances is not much different from allowing wealthy taxpayers to give themselves a tax cut because they sincerely believe that lower taxes will lead to economic growth and that higher taxes will harm everyone.

385. Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, in *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, HASTINGS CTR. 37 (2008), http://www.thehastingscenter.org/uploadedFiles/Publications/Briefing_Book/conscience%20clauses%20chapter.pdf.

386. *Id.* It is true that there could be other moral and ethical reasons for opposing vaccination, such as the treatment of animals in the production and research of the vaccine, but this is not typically the issue motivating parents. *See also* PAUL A. OFFIT, DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL 121–22 (2011) (explaining that some anti-vaccine protestors argue that vaccinations are unchristian in that two human cell strains taken from aborted fetuses have been used to create vaccines); *cf.* Art Caplan, *Bioethicist: US Children Suffer from Vaccine Exemptions*, NBC NEWS (July 31, 2012, 8:29 AM), <http://www.nbcnews.com/health/bioethicist-us-children-suffer-vaccine-exemptions-917155> (opting out of vaccinations has become increasingly easy, as states accept exemptions due to religion or other personal or philosophical reasons).

387. *See* Nadia N. Sawicki, *The Hollow Promise of Freedom of Conscience*, 33 CARDOZO L. REV. 1389, 1395 (2012) (quoting Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 328 (2005)).

I am not suggesting that vaccination conscience exemptions are a bad policy; it may be that so many parents would resist vaccination that law enforcement would collapse if a truly mandatory vaccination policy were implemented. But I am suggesting that conscience exemptions, in general, allow losers in a political struggle to reweigh policy differences, threatening the breakdown of democratic decision-making. Therefore, religious exemptions are a vast improvement over conscience exemptions.

I know of one example of my argument in practice. Allegheny County, where I live, has adopted exemptions to its Health Department Mandatory Vaccination Regulations that combine traditional religious and conscience provisions:

1004. EXEMPTION FOR IMMUNIZATION.

A. Medical Exemption. Children need not be immunized if a physician or his/her designee provides a written Statement that immunization may be detrimental to the health of the child. When the physician determines that immunization is no longer detrimental to the health of the child, the child shall be immunized according to this subchapter.

B. Religious Exemption. Children need not be immunized if the parent, guardian, or emancipated child objects in writing to the immunization on religious grounds or on the basis of a strong moral or ethical conviction similar to a religious belief.³⁸⁸

The exemption is denominated "religious," but includes "a strong moral or ethical conviction similar to a religious belief."³⁸⁹ This exemption is not very different from the *Seeger* approach to religious exemption, which included beliefs that were parallel to a traditional belief in God, and to the *Welsh* plurality, which distinguished among moral, ethical, and religious beliefs.³⁹⁰

Undoubtedly, parents who believe vaccinations are dangerous to their children are going to use this religious exemption, just as parents in other states use broader conscience provisions. Nevertheless, Allegheny County has presumably concluded that the

388. 28 PA. CODE § 23.84(a)–(b) (2012).

389. *Id.* § 23.84(b).

390. *Welsh v. United States*, 398 U.S. 333, 339, 342–43 (1970) (plurality opinion) (citing *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

use of the term “religious” will restrict mere policy disagreement to some extent—that it will serve as some sort of check on exemption claims.³⁹¹ I think that judgment is justified. There is a difference between having to self-identify as having a religious objection and having only to assert a conscience objection. My proposal for religious exemptions in general would simply eliminate the words “moral or ethical” altogether and allow the reference to religion to be interpreted broadly to include moral and ethical commitments to the objectivity of values.

Of course, some claimants will still utilize a religious exemption to enforce their policy disagreements with mandatory vaccination laws; however, others will respect a distinction between religious commitment and their own policy-based objections to vaccinations and will probably give in and follow the law.

In the end, conscience clauses exacerbate all the problems that critics associate with broadly interpreted religious exemptions. Religious exemptions invite such widespread noncooperation with laws that they may prove impractical. But, at least religious exemptions restrict such non-cooperation to deep differences of values. Conscience clauses do that as well, but also invite noncooperation out of purely policy disagreements. They are, therefore, not an alternative to religious exemptions, unless—like Leiter—one anticipates that no or few exemptions will be actually be granted.

VIII. OBJECTIONS TO THE PRO-RELIGION EQUALITY PROJECT’S EXPANSION OF RELIGIOUS EXEMPTIONS

As seen above, the expansion of the reach of religious exemptions proposed here does not go all the way to a recognition of conscience. The claimant of a religious exemption must be willing to be described as religious and must fit within a definition of religion, even if that is an expanded definition. Donald Beschle has argued that such a result “begins to resemble an individual right of nullification.”³⁹² He has presented a constitutional interpretation to limit that result by treating religion broadly, yet applying a standard of less than the purported strict scrutiny associated with a pre-*Smith* regime and statutory exemptions like RFRA.³⁹³ It seems to me the other way to limit that result is to retain the category of religion as the

391. See 28 PA. CODE § 23.84(a)–(b).

392. Beschle, *supra* note 366, at 382.

393. *Id.* at 382–83.

basis for exemption and to retain the structural limits on religion that *Seeger* put forth.

But that structural limit is itself offensive to some on both sides of the religious—nonreligious divide. The objection by nonbelievers to being involuntarily included within religious exemptions was adverted to above: *we* are not religious. And, it may be added, we nonbelievers disagree that traditional religious claims of conscience and nonreligious claims of conscience share the common ground that the Pro-Religion Equality Project proposes. There is more to religion than moral realism. There are non-rational elements to religion to which we nonbelievers profoundly object.

This objection on the part of some nonbelievers will be deeply felt. Opposition to, and separation from, traditional religion forms a deep part of the identity of such persons. There is something insulting about insisting to such a nonbeliever that her beliefs are “really religious.”

Nevertheless, the simple answer to this objection was already anticipated by Justice Black’s plurality opinion in *Welsh*, discussed above.³⁹⁴ In resisting self-identification as religious, *Welsh*, Justice Black suggested, may simply not have understood the broad scope the word religion had been given in the Supreme Court’s treatment of the draft exemption.³⁹⁵ We can reinterpret Justice Black’s point as follows: an applicant for a religious exemption who hesitates to label herself as religious is making a philosophical claim about the nature of religion, rather than a legal argument. The definition of religion, for purposes of an exemption statute or the Free Exercise Clause, is for the law to decide. If the law broadly interprets the word religion so that it fits many people who have nothing to do with traditional religion, the nonreligious claimant should have no hesitation in going forward with the exemption claim, including using the word religious to define the exemption claim.

Of course, it is not only nonbelievers who object to having to resort to broad religious exemptions.³⁹⁶ Some believers also object to the use of broad religious exemptions.³⁹⁷ Michael Paulsen argues that religious exemptions are only coherent when they are understood to rest on the claim that “true religious obligation is more important

394. *Welsh*, 398 U.S. at 341 (plurality opinion).

395. *See id.* at 341–42.

396. Paulsen, *supra* note 159, at 1188 n.51 (citing MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 15 (1965)).

397. *Id.*

than civil *obligation*.”³⁹⁸ And by true religious obligations, Paulsen means the assumption that God exists and that God’s commands are made known to the believer.³⁹⁹ For Paulsen, religion in the exemption context must be theistic.⁴⁰⁰

While I believe that Paulsen’s account fails as an actual description of government granted religious exemptions from the law—and Paulsen might agree with that because he calls his account a theory of religious liberty and not a theory of government granted religious freedom⁴⁰¹—I agree with him that for the believer, the commands of God are superior to those of the state. That is true by definition, but it is not important for our purposes. The believer does not need the state’s permission to obey God rather than man. The believer is going to be willing to suffer almost any fate, and certainly any fate an American government would impose, rather than disobey God.

I also agree with Paulsen that one can imagine some questions of religious practice over which the state may be presumed to be incompetent and over which the believer must be free to make his or her own judgments. An example of such a religious question would be how the mass is performed. In that kind of context, a theory of two separate realms—civil and religious—is coherent. Insofar as the framers of the Constitution accepted the two-realm theory, they undoubtedly had these kinds of issues in mind.

But again, this concession does not implicate questions such as laws touching on abortion, contraception, vaccination, hallucinogenic drugs, and all the other areas in which the issue of religious exemptions actually arise. In these fields, government is not incompetent to legislate for the public good and is obviously not going to cede to the religious dissenter the right to decide on her own whether to obey the law. Therefore, exemptions will be a government policy rather than an inherent right of the believer. Even if something that could be considered an inherent right is granted, as some might consider the Free Exercise Clause to be, its protections will still ultimately be enforced by an agent of the state—a judge.

Paulsen’s understanding of religious exemptions fails to provide an adequate framework for two reasons: his notion of God is too narrow and his notion of transmission is too simple. Let me take the question of transmission first. Even if God exists and makes demands, the model of the believer bound by God rather than the state does not

398. *Id.* at 1160.

399. *Id.* at 1161, 1184 n.42.

400. *Id.* at 1189.

401. *Id.* at 1159–60.

describe the usual situation of an exemption claimant. This error is illustrated in the current controversy over the contraception mandate. There is nothing in Christian scripture prohibiting the use of contraceptives, which is why the official Roman Catholic position is relatively unique among American Christians.⁴⁰² The interpretation comes about from a sophisticated interpretation based on an evolving tradition. Obviously I do not mean that it is for that reason a misinterpretation of the Gospel, only that it might be. In any event, the believer seeking a contraception exemption can be viewed as obeying men, that is, Church officials, rather than God directly.

Church tradition rejects my conceptualization here because the Church's teaching authority itself is believed to be divinely inspired.⁴⁰³ The Church does not make the distinction that the Jewish tradition does in the Oven of Aknai story in which the human source of interpretation, in contradistinction to the divine, is actually celebrated.⁴⁰⁴ Nevertheless, the model utilized by Paulsen of the believer obeying God rather than the state is too simplistic.

The other, and more problematic, issue for Paulsen is his understanding of God, the commands of God, and the nature of theism. For Paulsen, it is because God makes demands on believers that religious liberty requires the state to recognize religious exemptions from law.⁴⁰⁵

It is common today for lawyers to claim to know who God is—Justice Scalia, for example, asks confidently “what other God (in the singular, and with a capital G) there *is*, other than ‘the God of monotheism.’”⁴⁰⁶ But I am in the dark as to who this God is whom Professor Paulsen so blithely invokes, whose commands are clear and by whom one may easily distinguish believer from nonbeliever. Yes,

402. RAYMOND J. DEVETTERE, PRACTICAL DECISION MAKING IN HEALTH CARE ETHICS: CASES AND CONCEPTS 264 (3d ed. 2010).

403. See CATECHISM OF THE CATHOLIC CHURCH § 113 (2d ed. 1995). That section reads:

Read the Scripture within “the living Tradition of the whole Church.”
According to a saying of the Fathers, Sacred Scripture is written principally in the Church's heart rather than in documents and records, for the Church carries in her Tradition the living memorial of God's Word, and it is the Holy Spirit who gives her the spiritual interpretation of the Scripture (“according to the spiritual meaning which the Spirit grants to the Church”).

Id.

404. See Bruce Ledewitz, *The Openness of Talmud*, 41 DUQ. L. REV. 353, 356–57 (2003).

405. Paulsen, *supra* note 159, at 1160, 1162, 1183–84.

406. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893 n.3 (2005) (Scalia, J., dissenting) (internal quotation marks omitted).

Elliott Welsh crossed out the word religious in his application for draft exemption and described his opposition to war as founded on history and sociology.⁴⁰⁷ But he also claimed that his views were “religious in the ethical sense of that word.”⁴⁰⁸

Jesus taught, not everyone who calls me Lord will enter the Kingdom of Heaven but those who actually do the will of the father.⁴⁰⁹ Karl Barth said to the trade unionists that following Jesus “is not a matter of believing in any particular set of ideas, including Christian ones, but of actually following him, of building one’s life on the model of Jesus and relying on a connection to him.”⁴¹⁰ And Dietrich Bonhoeffer told us that God was teaching us to get along without him.⁴¹¹ Maybe it was Elliott Welsh who was the faithful believer. Who can presume to say otherwise?

To put this another way, Paulsen invokes a being-like God—one who gives rather clear orders that the state sometimes contradicts. Many believers, and even many Christians, reject this view of God in principle.⁴¹² In *Seeger*, the Protestant theologian Paul Tillich did so.⁴¹³ But the Roman Catholic theologian Karl Rahner does as well: “that God really does not exist who operates and functions as an individual existent alongside of other existents, and who would then as it were be a member of a larger household of all reality.”⁴¹⁴ Instead, God is “the most radical, the most original, and in a certain sense the most self-evident reality.”⁴¹⁵

Is it then false to say that God commands obedience? Not at all. But as long as the claimant for exemption believes that obedience is in fact commanded—that is, that certain behavior is obligatory beyond the claimant’s own judgment of policy—then all the law can say is that this is equivalent to God’s commanding this person to act. Moral realism in this sense is all the law can require. From the law’s

407. See *Welsh v. United States*, 398 U.S. 333, 341 (1970).

408. *Id.* (internal quotation marks omitted).

409. *Matthew* 7:21 (King James).

410. BRUCE LEDEWITZ, HALLOWED SECULARISM: THEORY, BELIEF, PRACTICE 73 (2009).

411. Dietrich Bonhoeffer, *General Teachings/Activities*, BIBLICAL DISCERNMENT MINISTRIES, <http://www.rapidnet.com/~jbeard/bdm/exposes/bonhoeffer/general.htm> (last modified Mar. 1996).

412. See, e.g., *United States v. Seeger*, 380 U.S. 163, 182–83 (1965) (quoting DAVID S. MUZZEY, *ETHICS AS A RELIGION* 86–87, 95, 98 (1st ed. 1951) (discussing the belief of God as a faith-based vision of humanity)).

413. See *id.* at 180 (quoting 2 PAUL TILlich, *SYSTEMATIC THEOLOGY: EXISTENCE AND THE CHRIST* 12 (1957)).

414. KARL RAHNER, *FOUNDATIONS OF CHRISTIAN FAITH: AN INTRODUCTION TO THE IDEA OF CHRISTIANITY* 63 (William V. Dych trans., 1978).

415. *Id.*

perspective, the moral realist is religious and her claim to exemption is religious. Anyone who disputes this, claiming that only she is genuinely religious, is not only arrogant but deluded.

VIII. Implications of the Pro-Religion Equality Project

What difference will it make to our national life that many nonbelievers might be considered religious from the point of view of the Vietnam War draft cases? After all, the burning political/judicial religious exemption issues of today are not likely to affect many nonbelievers. Today's exemption debates concern matters like religious employer coverage of contraception or prohibiting discrimination against gays.⁴¹⁶ These are not obligations that most nonbelievers would seek exclusion from in any event. And even if a broad approach to religion were extended to institutions for purposes of an analogy to the ministerial exception ratified in *Hosanna-Tabor*, there are few institutions that would fit even the broadened approach to religion described above.⁴¹⁷ The ACLU and the NRA, for example, are still not religious, even under the approach of the Vietnam draft cases because the grounds of their positions are primarily policy commitments, rather than deep moral claims.⁴¹⁸

I can imagine an organization—let us say a radical environmental group that practices a kind of pantheism or panentheism—that would come within the *Seeger* approach to religion, but the truth is that government regulation of the employment practices of such a group would raise serious free exercise issues already,⁴¹⁹ even without recourse to *Seeger* and the other draft cases.

So the discussion that follows is primarily a matter of a kind of identity politics that sometimes plays out in legal settings rather than resulting in a change in case outcomes. That is not insignificant, however, since some of America's worst political problems root in such identity claims.

If we revisit the debate between McConnell and Feldman, as extended by Leiter, we see that the terms of that debate change under

416. See *Romer v. Evans*, 517 U.S. 620, 623–24 (1996); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d. 459, 461–62 (2006).

417. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

418. See *supra* text accompanying notes 314–17 (explaining the Court's broadening of the *Seeger* test by its emphasis on the morals and ethics as grounds of religious belief).

419. See *Africa v. Pennsylvania*, 662 F.2d 1025, 1033 (3d Cir. 1981) (“[U]nder certain circumstances, a pantheistic-based philosophy might qualify for protection under the [F]ree [E]xercise [C]lause.”).

the approach of the Vietnam draft cases. It no longer makes sense to ask what is special about religious liberty, contrasting religion with some non-specified, other realm. Religion and that other realm, which Feldman denominated as wisdom or philosophy, but did not define,⁴²⁰ and which Leiter refers to as conscience,⁴²¹ are now regarded as overlapping religious commitments. Most such claims are protected by the Free Exercise Clause and by any statutory religious exemption that is enacted.

At a certain point in their debate, Feldman insisted that the obligation that Antigone felt to bury her brother, in violation of the policy of the state, raised a philosophical rather than a religious claim and that this demonstrated that religion is not special in terms of deserving protection.⁴²² From the standpoint of the draft cases, however, Antigone's commitment is clearly religious and she is automatically protected to the same extent as any other religious claim of exemption would be.

So, in all of the current fights in law that revolve around special treatment for religion, the Pro-Religion Equality Project treats some nonbelievers as if they were religious in a traditional sense. This treatment then invites believers and nonbelievers to see the commonality of their commitments. This insight will hopefully lower the temperature of legal disagreements between believers and nonbelievers.

As I suggested in Part II above, there is an increasing divide today in America between believers and nonbelievers.⁴²³ I hope that this divide is not something inevitable or inherent, but it is something real. It is something that we should try to overcome.

The division that we see need not be fundamental. It might only be a matter of political disagreements. One of the reasons that nonbelievers are alienated from demands for religious exemptions is that they disagree with the political thrust of the claimed exemption.⁴²⁴ In other words, many nonbelievers favor gay rights, while some religious believers want exemptions from laws banning discrimination against gays.⁴²⁵ Supporters of the Vietnam War who

420. See Feldman & McConnell, *supra* note 164.

421. LEITER, *supra* note 2, at 26.

422. Feldman & McConnell, *supra* note 164.

423. See discussion *supra* Part II.

424. See Laycock, *Sex, Atheism, and the Free Exercise of Religion*, *supra* note 128, at 422–32.

425. See Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who*

thought that Seeger and Welsh really just opposed the war might have felt similarly about religious exemptions. This kind of disagreement is at least, in principle, capable of compromise and might prove temporary.

But, the division between believers and nonbelievers might instead be much deeper. The more dangerous division occurs when nonbelievers see “religious liberty as a protection only for believers,” as Laycock puts it.⁴²⁶ That kind of division can perhaps be bridged by a broader understanding of religion and of religious exemption claims.

My approach to healing this division is to include the beliefs of nonbelievers within the rubric of religion. That is how the draft cases operate. My approach is quite different from the way others are currently thinking about nonbelievers and religious liberty. For example, one way people think about this issue is to ask whether atheism is itself a religion. Michael McConnell is surely right when he argues that the answer to this question must be no, because nonbelief by itself does not generate moral obligations.⁴²⁷ The one exception to McConnell’s observation—one he would accept⁴²⁸—might be that discrimination against nonbelief itself would be unconstitutional, as in a religious oath case such as *Torcaso*.⁴²⁹ Even a negative answer to a religious question, such as whether God exists, is religious in the sense of protected by the Establishment and Free Exercise Clauses.⁴³⁰

Nelson Tebbe goes further than McConnell in bringing nonbelief and belief together by pointing out that nonbelievers are starting to develop more positive approaches to morality and human flourishing that generate particular demands on conduct that could come into conflict with the demands of the state.⁴³¹ Tebbe anticipates that because of this trend, “it might soon make sense for religious

Discriminate Against Married or Marrying Gays in Context, 47 WAKE FOREST L. REV. 173, 176 (2011); *Changing Attitudes on Gay Marriage*, PEW RESEARCH CENTER’S RELIGION & PUB. LIFE PROJECT (June 2013), <http://features.pewforum.org/same-sex-marriage-attitudes/slide3.php>.

426. Laycock, *Sex, Atheism, and the Free Exercise of Religion*, *supra* note 128, at 422.

427. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 10–11 (1985); *see also* Tebbe, *supra* note 225, at 1156.

428. McConnell, *supra* note 427, at 10 (“[E]ach person must be as free to disbelieve as he is to believe.”).

429. *See Torcaso v. Watkins*, 367 U.S. 488, 489 (1961).

430. *See Laycock, Religious Liberty as Liberty*, *supra* note 364, at 326 (“[R]eligion’ is any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists.”).

431. Tebbe, *supra* note 225, at 1157–58.

freedom law to protect practices that are demanded by this form of contemporary humanism in much the same way that it protects familiar religious observances.”⁴³²

But both McConnell and Tebbe are still utilizing terminology that distinguishes belief from nonbelief in more than just a sociological or self-identifying sense. If, instead of such labeling, we asked what nonbelievers actually believe, as Laycock once did for different types of religious believers,⁴³³ we might find a sense of “transcendent moral obligation”⁴³⁴—a sense that what a person does is of infinite significance in the universe and that, at least in that sense, persons are called to practice a particular way of life. In other words, many “believers” and “nonbelievers”—and now I have to use quotation marks for these terms—believe the same kinds of things.⁴³⁵

Up to this point, I have been discussing exclusively Free Exercise issues. On the side of the Establishment Clause, the expansion of the understanding of what is religious would seem to restrict the reach of that clause rather than expanding it.⁴³⁶ But any such conclusion could not be accepted. If religion is grounded in the objective reality of values, then clearly the government may establish something that would be considered religion for purposes of the Free Exercise Clause—government may support it, speak in favor of it, and teach it in its public schools—without establishing “religion” for purposes of the Establishment Clause. That is, government would still be permitted to broadly oppose relativism and nihilism under its

432. *Id.* at 1158.

433. Laycock, *Religious Liberty as Liberty*, *supra* note 364, at 335.

434. *Id.* at 336.

435. Terminology is indeed awkward in this context. How can people be labeled nonbelievers when the argument is being made that they have beliefs relevantly similar to people traditionally regarded as religious? Maybe the terms should be churchgoers and non-churchgoers.

436. That is, on the assumption that the word religion has the same meaning in the two clauses. I reject this position, but the unitary definition approach has an excellent pedigree. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting) (“‘Religion’ appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid ‘an establishment’ and another, much broader, for securing ‘the free exercise thereof.’ ‘Thereof’ brings down ‘religion’ with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.”). The majority in *Everson* did not dispute this aspect of Rutledge’s dissent. See *id.* at 3–28 (majority opinion).

teaching and speaking powers. I have discussed these matters elsewhere.⁴³⁷

Others have previously noted that broad definitions of religion for purposes of the Free Exercise Clause lead to a divergence in which religion means something different for Establishment Clause purposes.⁴³⁸ But this need not be seen as weakening Establishment Clause values because discrimination among religions is still prohibited.

To illustrate how the anti-discrimination policy would work in the establishment context, consider that if the word God were understood along the lines suggested in *Seeger*, the debate over the permissibility of the Pledge of Allegiance and the National Motto would be very different. God would then be seen as, among other, more traditional, understandings, the God above the God of theism rather than as only a supernatural being separate from the natural world. With that broad understanding, it would no longer be necessary to "disregard" polytheists and even some monotheists, as Justice Scalia felt compelled to do in *McCreary County*,⁴³⁹ in order to uphold these public acknowledgments of God. Such persons would not necessarily be excluded from belief in such a broadened God concept.

A broader understanding of religion would also have the effect of opening up the curriculum of the public schools. Not only could and should such schools offer a curriculum in the formation of objective values, but such a curriculum should expose students to a variety of viewpoints now regarded as "religious" and therefore out of bounds. It should be remembered that as part of the opening up of religion that led to *Seeger*, the Court in *Torcaso v. Watkins* in 1961, which invalidated a Maryland requirement of a belief in God to hold public office, had already defined "secular humanism" as a nontheistic religion.⁴⁴⁰ And, as Douglas Laycock reminds us, the first Humanist

437. See LEDEWITZ, CHURCH, STATE, AND THE CRISIS IN AMERICAN SECULARISM, *supra* note 235, at 99, 118.

438. See Steven D. Collier, Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 Emory L.J. 973, 991 (1982) ("A second major weakness of the *Seeger/Welsh* definition is that . . . a different definition apparently is required for the Establishment Clause . . .").

439. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) ("With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

440. 367 U.S. 488, 495 n.11, 496 (1961).

Manifesto also presented humanism as a new religion.⁴⁴¹ Insofar as that is the case, however, the result should not be to restrict the teaching of humanism in the public schools, but to recognize when humanism is being taught and to ensure that many points of view are presented, including theistic ones. Currently, as many believers object, such humanism is taught *sub rosa*, while efforts to engage that worldview are excluded as religious.

This approach does not change everything—it does not support challenges to the teaching of evolution, for example. Evolution in and of itself is not religion even under an expanded definition. The fact that evolutionary theory may have the effect of discrediting some interpretations of Genesis does not render the theory itself religious.

On the other hand, evolution can be taught, and sometimes is, as support for what Charles Taylor calls “exclusive humanism.”⁴⁴² If that is done, then the school *is* teaching a religion when it presents such a perspective and must either stop doing so or must expand its offerings to allow challenges to that worldview.

Aside from the effect for law of an expansive approach to religion, what will happen politically and culturally if the religious and the secular come to be understood differently from the way we tend to understand them now? What would it mean for this society to see the common ground between religious belief and some forms of what we have regarded heretofore as nonbelief?

Once the common ground between believers and nonbelievers is seen in a way that penetrates the culture, the divide between believers and nonbelievers may recede. Once nonbelievers begin to ask what it means to feel the weight of infinite significance, they may stop speaking of “rationality” as the basis of life and they may cease to regard believers as merely superstitious. It may even occur to nonbelievers that words like God might include and describe many of their own commitments. Once believers accept the moral realism of non-churchgoers, they may reduce their insistence that atheism leads to immorality. This is what I mean by the suggestion that the draft cases can heal our culture war divisions.

There are a number of hints that this kind of recognition may be occurring. One obvious example is the new book by New York Times columnist Ross Douthat, *Bad Religion: How We Became a Nation of Heretics*,⁴⁴³ which argues that America is not a secular

441. Laycock, *Religious Liberty as Liberty*, *supra* note 364, at 328.

442. CHARLES TAYLOR, *A SECULAR AGE* 18–19 (2007).

443. ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* (2012).

country, but is instead still a Christian country but one with increasingly unorthodox doctrines.⁴⁴⁴ Douthat's analysis can help us understand how so many persons not affiliated with religion can tell pollsters that they believe in God and how so many persons who say they do not believe in God believe in other forms of supernaturalism, like angels.⁴⁴⁵ In another example, without specifically mentioning Douthat's book, Kate Blanchard and Rachel Ozanne recently—in May, 2012—discussed the heretic versus atheist terminology in terms of their own beliefs in the online magazine Religion Dispatches.⁴⁴⁶ Their discussion thoroughly dissolves any easy reference to belief and nonbelief.

A somewhat earlier example, and one I have written about before,⁴⁴⁷ is Andre Comte-Sponville's book, *The Little Book of Atheist Spirituality*.⁴⁴⁸ Comte-Sponville, though an atheist, prays because, quoting Simone Weil, "Love and prayer are merely the highest form of attention."⁴⁴⁹ There is no reason to distinguish Comte-Sponville's beliefs from those of many believers and he freely acknowledges his debt to the Christian tradition.

Another book published in spring 2012, Alain de Botton's *Religion for Atheists*,⁴⁵⁰ also seeks a closer connection for nonbelievers to the religious traditions. David Brooks wrote of de Botton that he "looks around and sees a secular society denuded of high spiritual aspiration and practical moral guidance."⁴⁵¹ The traditional religions knew how to elevate human life, a wisdom we nonbelievers increasingly lack. Brooks makes fun of de Botton's suggestion of a quarterly Day of

444. *Id.* at 4.

445. *See id.*

446. Kate Blanchard, *Coming Out as a Heretic*, RELIGION DISPATCHES (May 10, 2012), http://www.religiondispatches.org/archive/atheologies/5941/coming_out_as_a_heretic/; Rachel Ozanne, *'Heretics' or 'Atheists'? A Response*, RELIGION DISPATCHES (May 23, 2012), http://www.religiondispatches.org/archive/atheologies/6005/heretics_or_atheists_a_response.

447. *See* Ledewitz, *Seeking 'Common Ground'*, *supra* note 232, at 82–84.

448. ANDRE COMTE-SPONVILLE, *THE LITTLE BOOK OF ATHEIST SPIRITUALITY* (Nancy Huston trans., 2007).

449. *Id.* at x, 143.

450. ALAIN DE BOTTON, *RELIGION FOR ATHEISTS: A NON-BELIEVER'S GUIDE TO THE USES OF RELIGION* (2012).

451. David Brooks, *Without Gods: Alain de Botton's 'Religion for Atheists'*, N.Y. TIMES, Mar. 16, 2012 (book review), http://www.nytimes.com/2012/03/18/books/review/alain-de-bottons-religion-for-atheists.html?ref=bookreviews&_r=0.

Atonement in a secular society,⁴⁵² but that may be just the kind of practical ceremonialism that nonbelievers need.

Another recent example of a closer connection between believers and nonbelievers is a short essay by the well-known atheist Austin Dacey in which he discusses the law of blasphemy related to his book, *The Future of Blasphemy*.⁴⁵³ Dacey makes the point that there is symmetry between the commitments of the believer and those of the nonbeliever:

From a moral perspective, there is an important symmetry between the attitude of the believer who reserves special reverence for a deity, saint, or prophet, and the attitude of the secularist who asserts that every person is equally holy. Neither of these beliefs is uniquely deserving of being labeled a spiritual commitment, relegating the other to mere “speech” against that commitment.⁴⁵⁴

While Dacey is arguing a different point from mine here—Dacey is arguing that atheists deserve protection as much as do religious believers⁴⁵⁵—his premise is my thesis: that persons who do not believe in God still dwell in a world, still speak the language, still make commitments to and still are in relationship with, the sacred.

But probably the most significant example of movement of nonbelievers into the neighborhood of religion is that of the late legal philosopher Ronald Dworkin. In August, 2013, some months after his death in February, Harvard University Press published his last book, *Religion Without God*.⁴⁵⁶ I have not yet read this book, but I was able to read the first chapter, which was excerpted some months before in the *New York Review of Books*.⁴⁵⁷ Here Dworkin attempts to delineate a religious viewpoint without invoking the

452. *Id.*

453. Austin Dacey, *Sacrilege*, in *THE FUTURE OF BLASPHEMY: SPEAKING OF THE SACRED IN AN AGE OF HUMAN RIGHTS* 16 (2012).

454. Austin Dacey, ‘*Religious Freedom*’ for Atheists, *RELIGION DISPATCHES* (May 24, 2012), http://www.religiondispatches.org/archive/atheologies/6012/whose_blasphemy_the_atheist_case_for_%27religious_freedom%27/.

455. *See id.*

456. RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013).

457. Ronald Dworkin, *Religion Without God*, *N.Y. REV. OF BOOKS*, Apr. 4, 2013, <http://www.nybooks.com/articles/archives/2013/apr/04/religion-without-god/>.

supernatural.⁴⁵⁸ The result is very much along the lines set forth in this article. The religious attitude insists that values are real and fundamental—as real, says Dworkin, as trees or pain.⁴⁵⁹ The religious attitude does rest on faith, as Leiter says, but so do science and mathematics, according to Dworkin.⁴⁶⁰

At this point I have to ask, what is the problem? Why are we divided? Once believers are seen as nonbelievers and nonbelievers as believers, it will be easier for us to talk with each other. But this recognition places a burden on persons not affiliated with traditional religion. For, whereas many traditional believers really are willing to admit that they are not genuinely believers—that is just akin to admitting that we are all sinners—we secularists have been unwilling to press our beliefs beyond insipid clichés about rationality. We “nonbelievers” must begin to ask what it is we believe and affirm. In a general sense, we affirm significance, objectivity and meaning. But we have not yet made these general commitments definite. Insofar as the Vietnam draft cases are willing to grant religious exemption to a belief that “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption,”⁴⁶¹ we now must begin to ask in a serious way, what kind of nontheistic, nonreligious belief *is* parallel to a belief in the orthodox God? In the sense that we secularists have never sought to clarify our beliefs in a fundamental way, we have not yet really begun to be secular.

IX. CONCLUSION: WE HAVE NEVER BEEN SECULAR

I write this conclusion with obvious apologies to Bruno Latour’s book, *We Have Never Been Modern*.⁴⁶² Latour’s point is that, for all our vaunted modernity, in a sense we have never been modern in our sensibilities or comportment.⁴⁶³ Well, we have never been secular either.

We have never been secular in two senses. On the one hand, we live under the great shadow of the Christian experience. The emptiness of our nonbelief has the shape of the traditional God, which is why the New Atheists had no trouble attacking the concept of God, which they felt they understood perfectly well. It is also why

458. *Id.*

459. *Id.*

460. *Id.*

461. *United States v. Seeger*, 380 U.S. 163, 166 (1965).

462. BRUNO LATOUR, *WE HAVE NEVER BEEN MODERN* (Catherine Porter trans., 1993).

463. *Id.* at 46–47.

this culture retains so much supernaturalism—vampire chronicles,⁴⁶⁴ God as the Chairman in the movie, *The Adjustment Bureau*,⁴⁶⁵ The One in the *Matrix* movies,⁴⁶⁶ and so forth. Of course, we also retain the notion of enlightened humanism that we received from the medieval Church.

But there is another sense in which we have never been secular. Our secularism has manifested largely in an absence of religion. If we ask for the positive meaning of secularism, or its foundations, we get vagueness and indeterminacy. I have recently examined the potential for meaning in the Establishment Clause context,⁴⁶⁷ and the same is true here in the context of religious exemptions and the Free Exercise Clause. There is a need for explicit affirmation of the grounds of meaning that are available in a secular world.

The goal for secularism must be to be fully secular in both these senses. Insofar as we borrow from Christianity, we should do so consciously, so that we are not carrying forward habits we should be breaking. In that way, we would not simply be living in the shadow of the Church.

But we need to act consciously in all regards, not just in rejecting the concept of the supernatural Creator God. We need to consciously build a positive secular civilization. We who are not traditionally religious need to commit to a meaningful way of life that is just as exacting as are the demands of organized religion.

If we do this, I believe that secular civilization will not end up in conflict with the Christian civilization that Pope Benedict had been encouraging the Church to reinvigorate before he stepped down.⁴⁶⁸ It is false to think that there is much in Christian tradition that secularism needs to reject. The antagonism that has been manifest is either merely political—antagonism to certain political positions held by some religious believers, but of course not by others—or is the result of ignorance of the positive inheritance we receive from the Church. The liberal tradition and the scientific tradition are either

464. 1 ANNE RICE, *THE VAMPIRE CHRONICLES COLLECTION* (2002).

465. See *THE ADJUSTMENT BUREAU* (Universal Pictures 2011).

466. See *THE MATRIX* (Warner Bros. 1999); *THE MATRIX RELOADED* (Warner Bros. 2003); *THE MATRIX REVOLUTIONS* (Warner Bros. 2003).

467. Bruce Ledewitz, *Toward a Meaning-Full Establishment Clause Neutrality*, 87 CHL.-KENT L. REV. 725 (2012).

468. See David Kerr, *Pope Challenges US Bishops to Revive Christian Culture*, CATHOLIC NEWS AGENCY (June 5, 2012, 4:02 AM), <http://www.catholicnewsagency.com/news/pope-challenges-us-bishops-to-revive-christian-culture/>.

direct achievements of Christianity or, if that is too strong, at least its achievement in large part.

These considerations arise in the Free Exercise context as we ask the question from *Seeger* about a belief that occupies a place parallel to the orthodox belief in God.⁴⁶⁹ I only intend in this paper to tentatively suggest some directions in which that question can lead secularists.

First, God is binding. God is not experienced as a choice. This is why Paulsen argues that only monotheists are protected by the Free Exercise Clause—because God really does “make commands of loyalty and obedience that constrain human behavior.”⁴⁷⁰ Laycock understands this, which is why he points to the role that natural law could play in the life of the religiously nonaffiliated.⁴⁷¹ The foundations of such bindingness, however, in the absence of God, are obviously in question. Nevertheless, as C.S. Lewis explained, the most important commitment that the various wisdom traditions share is not to God, but to the worldview that humans are a certain kind of being and that the universe is a certain kind of thing to which we must conform.⁴⁷² And this must be true not just in terms of policies, but of personal morality—away from what David Brooks calls our current moral “mediocrity.”⁴⁷³

Second, and following that sense of obligation, there must be a sense of consequence. This sense of consequence is known in monotheism as God’s judgment.⁴⁷⁴ I have not understood the strange apathy about global warming in policy debate. Earlier generations would have intuited God’s judgment in the warming climate that threatens human life, judgment for the greed that creates an economic system that sacrifices the needs of the poor, and of most people, and that ignores responsibility for God’s good creation. Global warming has the perfect shape of Biblical prophecy—if you do not do God’s will, the rains will not fall. Where is this witness today? Secularism must be able to affirm that there are consequences for the failure to obey the restrictions reality puts on us. Our out of control economic development and globalization are simply the Tower of Babel.

469. See *United States v. Seeger*, 380 U.S. 163, 165–66 (1965).

470. Paulsen, *supra* note 159, at 1173.

471. Laycock, *Religious Liberty as Liberty*, *supra* note 364, at 336.

472. LEWIS, *supra* note 236, at 80–81.

473. David Brooks, Op-Ed., *The Moral Diet*, N.Y. TIMES, June 7, 2012, <http://www.nytimes.com/2012/06/08/opinion/brooks-the-moral-diet.html>.

474. See Jerome Hall, *Biblical Atonement and Modern Criminal Law*, 1 J.L. & RELIGION, 279, 280–83 (1983).

Third, God is a style. It is not an accident that all religions have their ceremonies, holidays, rites and rituals. These all help form a religious way of life. But what is the secular way of life? Even if there are many possible forms of secular life, it must still be the case that there are meaningful non-rational elements of beauty in secular living. The plaintiffs in the Vietnam draft cases raised ethical issues out of lives of meditative thoughtfulness.⁴⁷⁵ That certainly is a kind of style. But secularists in general have not been interested in how secularists will actually live, beyond coming up with substitutes for Christmas for the children of secularist parents.

Fourth, God is in community. Yes, the Supreme Court has held that membership in a religious group is not a requirement for raising a claim of religious exemption.⁴⁷⁶ However, our concern here is not law; our concern is secularism as a way of life. While a way of life can be singular and idiosyncratic, at some point there must be a reference to a community. In addition, the traditional religions have a sense that the demands of the group have something to do with the happiness and flourishing of humanity as a whole. That is another aspect of community ignored by secularism up to this point

Finally, for purposes of this brief summary, God is comprehensive. In the monotheistic traditions, there is not a separation between personal morality and politics. These are all one. For example, Judaism, Christianity, and Islam have long histories of teachings on both ceremonialism and spiritual practices on the one hand, and political life and economic organization on the other. The Vietnam draft cases tended to forget this and asked only about beliefs concerning war. But one belief by itself simply cannot be parallel to the place of God in the life of the believer.

With this understanding of what it means to be religious, are we in fact all religious? The answer is actually both yes and no for people who call themselves religious and for people who call themselves nonbelievers. There is a lot of functional atheism in the world and much of it occurs in churches.

So, those people who see reality as an accident and human life as meaningless are not truly religious in the sense of having beliefs parallel to the orthodox belief in God. This is also true of anyone who puts his own interests above those of others and of the planet. Some of those people go to church quite regularly while others do not.

475. See *Welsh v. United States*, 398 U.S. 333, 335–38 (1970).

476. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989).

On the other hand, we who see reality as binding, consequential, beautiful, communal, and comprehensive and who try to live out of that understanding really are religious. Most of us, though like the sinners we are, generally fail. Believers are not any better off in this context than nonbelievers.